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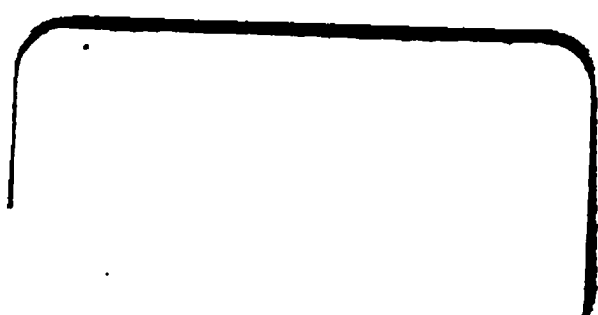
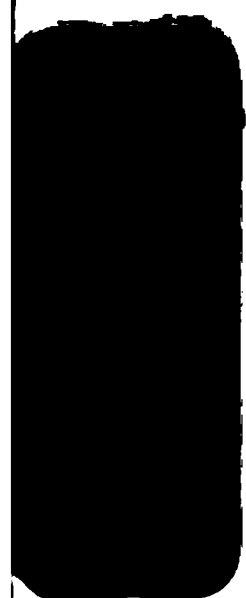
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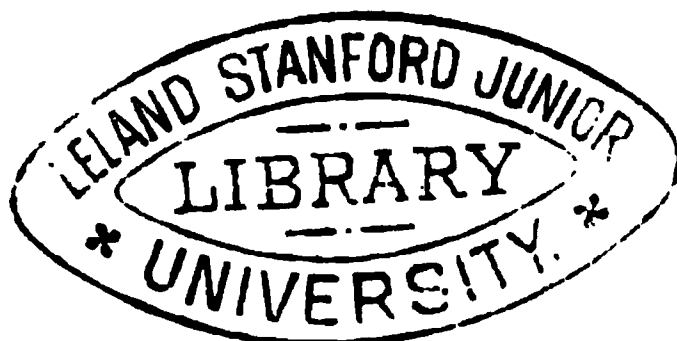
THE  
AMERICAN  
AND  
ENGLISH  
RAILROAD CASES

EDITED BY LAWRENCE LEWIS, JR.

A COLLECTION OF ALL THE  
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA  
AND ENGLAND

—  
VOL. XIX  
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**FAWCETT**

*v.*

**PITTSBURG, CINCINNATI AND ST. LOUIS RY. CO.**

*(24 West Virginia Reports, 755.)*

A railroad company in pursuance of a contract with a coal company ran certain cars upon a siding belonging to the latter company which terminated at the bank of a river in a tipple. Owing either to the careless way in which the cars were run or the defective condition of the track, the cars ran into the river and sunk the plaintiffs' barge. In a suit against the railroad company to recover damages, *held*, that granting that the accident was due to the defective condition of the track, the company was liable for having run their cars on such a track, and that the negligence of the coal company in failing to keep the track in repair was not to be considered as being alone the *causa causans*.

Where objection is made to the introduction of evidence and overruled by the court, the appellate court will hold such objection as having been waived by the exceptor unless the ruling of the court is excepted to.

Where it is intended to have the appellate court review the rulings of the circuit court upon the question of the sufficiency or insufficiency of the evidence to warrant the verdict of the jury, the bill of exceptions should contain a certificate of the facts proved, not of the evidence produced on the trial, especially where the evidence is conflicting.

**THE facts of the case appear in the opinion of the Court.**

**J. Dunbar for plaintiff in error.**

**G. W. Caldwell for defendants in error.**

**SNYDER, J.**—Action of trespass on the case brought, October 4, 1882, by Thomas Fawcett & Sons against the Pittsburg, Cincinnati & St. Louis Ry. Co. in the Circuit Court of Brooke County to recover damages for the destruction of the plaintiffs' coal barge. At the June term, 1883, a trial was had by jury on the general issue, a verdict returned in favor of the plaintiffs for one thousand six hundred and eighty-one dollars and seventy-five cents, the motion of the defendant to set aside the verdict overruled and judgment entered for the plaintiffs. The defendant has brought the case to this Court for review.

It appears from the bill of exceptions that the defendant was

operating a line of railway along the east bank of the Ohio River in Brooke County, and that on July 31, 1880, it entered into a written agreement with the Keystone Coal Company, limited, by which it agreed to transport over its road from a point near Hanlan's Station to a point on the Ohio River opposite the city of Steubenville, certain quantities of coal for said coal company each day at a fixed price per ton, the said coal company to provide and maintain in proper order a side track at the latter point and furnish all necessary cars and keep the same in repair to the satisfaction of the general superintendent of the defendant, in charge of that portion of its railway, for the conduct of the business contemplated by the agreement, which was to continue in force for three years from its date; that the plaintiffs introduced evidence tending to prove that the said coal company had constructed the side track at the point agreed upon, extending from the main line of defendant's railway to the Ohio River, a distance of about six hundred feet, terminating at a tipple constructed for dumping coal from the cars into barges in the river; that this side track had been located by a competent engineer according to specifications submitted to and approved by the chief engineer of the defendant; that it had been constructed in accordance with said specifications, and after its completion had been inspected by an agent of the defendant and pronounced satisfactory; that after this side track had been used by the defendant to deliver coal in barges in the river for more than a year, the defendant about five o'clock on the morning of January 8, 1882, switched from its main track upon this siding fifteen loaded coal cars in such a negligent and careless manner that they were driven over the siding through the tipple and into the river, where they fell upon and into the barge of the plaintiffs located at the mouth of the tipple for receiving coal for shipment, and that the plaintiffs' barge was thereby sunk and destroyed. On the other side, the defendant offered evidence tending to contradict that of the plaintiffs in many respects and tending to prove that the said siding was not constructed in a proper and safe manner, and that the loss of the plaintiffs' barge was caused by the defective construction and unsafe condition of said side track and not by the want of care or the negligence of the defendant, and that therefore the defendant was not responsible for the loss of the plaintiffs' barge.

After the close of the evidence the plaintiffs' counsel asked the Court to instruct the jury as follows:

"1st. If the jury believe from the evidence that the barge of the plaintiffs was destroyed by the negligence of the defendant, and that said negligence was the immediate or proximate cause of the loss of said barge, the verdict should be for the plaintiffs.

"2d. If the jury believe from the evidence that the said barge was destroyed by the defendant's negligence, then the jury are in-

structed that the defendant cannot excuse its negligence by proof that a third party's negligence contributed to the loss of said barge.

"3d. If the jury believe from the evidence that the joint negligence of the defendant, the P., C. & St. L. R. Co. and the Keystone Coal Company, limited, caused the loss of the plaintiffs' barge, the verdict should be for the plaintiffs, unless the jury believe from the evidence that the plaintiffs were negligent in putting their barge under said coal tipple."

Which said request to charge was granted by the Court, and said charge was given to the jury; to which the defendant, by its counsel, then and there excepted.

Thereupon the defendant's counsel asked the Court to charge the jury as follows:

*First Proposition.*—"The burden of proof is on the plaintiffs to show the negligence complained of, and if they have failed to show, by a preponderance of evidence, that the accident resulted from the negligence of the defendant, their verdict must be for the defendant.

*Second Proposition.*—"If the jury believe from the evidence that the defendant, by its agents and servants, was operating its road in such manner as prudent and reasonable agents would operate it under like circumstances, and said agents and servants were using ordinary care in the discharge of their duties, then the defendant is not liable in this action.

*Third Proposition.*—"That if the jury believe from the evidence that the Keystone Coal Company constructed the railroad at their tipple opposite the city of Steubenville for the use of its business in receiving its cars from the defendant's railroad, that it was unsuitable, unsafe and insecure, and the accident resulted from such insecurity and unsafeness, then the defendant is not liable for this accident unless they negligently performed their duty in placing the cars upon said coal company's railroad.

*Fourth Proposition.*—"If the jury find from the evidence that the firm of Thomas Fawcett & Sons were in a position to know the condition and situation of the Keystone Coal Company's railroad, and its fitness or unfitness, security or insecurity for the performance of the work it was intended and built to accomplish, then the plaintiffs will not be entitled to recover in this action from this defendant if they believe the accident resulted from the contributory negligence of the Keystone Coal Company, even if the jury should find the acts of the agents and servants of the defendant were the remote and not the proximate cause of the injury complained of.

*Fifth Proposition.*—"That if the jury find from the evidence that the road constructed by the Keystone Coal Company was a differently constructed road from the plans and specifications submitted to the agents and servants of the defendant and accepted by

them, and the accident resulted in whole or in part from such changes or alterations made by the Keystone Coal Company without the knowledge and consent of the defendant to said alterations and changes, then the defendant is not liable in this action, unless the accident was the direct result of the negligence of the officers, agents and servants of the defendant."

But the Court refused to give the third, fourth and fifth propositions asked by the defendant. To which refusal the defendant, by its counsel, then and there excepted.

The plaintiff in error assigns as error the rulings of the Court on these instructions. The question presented by this assignment does not, it seems to me, relate to the right of the plaintiffs to recover for the loss of their barge, but whether or not the jury had the right to exonerate the plaintiff in error by finding that the loss was occasioned by the neglect or misconduct of the Keystone Coal Company. The only evidence tending to prove any default on the part of the coal company was that which tended to show that it had not constructed and kept in proper repair the siding leading from the defendant's main track to the tipple, on the bank of the river. Whether this alleged default of the coal company could exonerate the plaintiff in error from liability depends wholly upon the fact whether it could under any circumstances be treated as the proximate cause of the loss sustained by the plaintiffs. That it may have been the remote cause of the loss is altogether immaterial. The cause of an injury, in contemplation of law is that which immediately produces it as its natural consequence; and, therefore, if a party be guilty of a default or act of negligence which would naturally produce an injury to another, but, before such injury actually results, a third person does some act which is the immediate cause of the injury, such third person is alone responsible, though the injury could not have occurred but for the default or neglect of the first party. The causal connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which latter act is in law regarded as the sole cause of the injury according to the maxim, *in jure non remota causa sed proxima spectatur*. *Washington v. B. & O. R. R. Co.*, 17 W. Va. 190.

In the case at bar, if we admit that the coal company had so defectively constructed the siding as to make the injury inevitable whenever the siding should be used to transfer coal cars over it, still no injury could have resulted unless the coal cars had been placed upon it, which did, in fact, by destroying the plaintiffs' barge, produce the injury complained of. The coal cars were put upon the siding by the defendant and not by the coal company. The siding of itself, however defective it may have been, could not have been the sole cause of the injury. If the cars had not been put on it by the defendant the injury could not have resulted.



There being no evidence tending to prove that the accident was inevitable, it must have resulted from negligence. It was negligence in the defendant to run cars upon the siding if it was so defective and dangerous as the defendant has attempted to show. It is, therefore, clear that the direct and proximate cause of the injury to the plaintiffs was the negligence of the defendant either in running the coal cars upon an unsafe siding or in doing so in a negligent and careless manner. In neither event could the coal company be regarded as the immediate and proximate cause of the destruction of the plaintiffs' barge, though it may have been the remote cause; but for such remote cause it could not have been made liable to the plaintiffs in this action. The instructions of the plaintiffs and the first and second propositions of the defendant which the Court gave to the jury having fairly submitted to the jury the question of negligence, the Court did not err in refusing to give to the jury the third, fourth and fifth propositions of the defendant, which attempted to exonerate the defendant by instructing the jury that they might find that the remote cause, the default of the coal company, had produced the injury to the plaintiffs. There was, therefore, no error to the prejudice of the plaintiff in error in the rulings of the Court upon the instructions.

The next error relied on by the plaintiff in error is, that the Court improperly admitted the following question and answer of the plaintiffs' witness, J. M. Bailey:

*Question*—"State to the jury after this accident, by which the Keystone Coal Company lost its cars on the 8th day of January, 1882, at its tipple in Brooke County here, whether or not you had a conversation or any agreement or arrangement with Mr. Caldwell, the superintendent of the defendant's railway, with respect to the wreck at the said tipple; and if so, what was that arrangement. I mean to include the barge as well as the cars."

(Objected to. Objection overruled.)

*Answer*—"Yes, sir. In company with Mr. Lee and Mr. Brown, I called upon Mr. Caldwell, at his office in the city of Pittsburg, and after talking the matter over, there had been considerable controversy about the railroad company assuming any liability of the accident at all, but he finally said that they acknowledged their—"

(EXCEPTION.—Objected to. Objection overruled and exception by defendant.)

(Witness continuing answer)—"Finally acknowledged that the railroad company were liable for the accident, and that they would go to work and clean out the tipple, take out the cars and barge and restore the tipple to its former condition."

Before this question was asked it had been proven that Mr. Caldwell was the general manager and superintendent of the defendant's company. The question, therefore, seems to me to be



entirely unobjectionable. Corporations can act only through their officers and agents, and the acts of these are the acts of the corporation. The general manager of a railroad company is the executive officer of the corporation. No evidence was offered or even suggested that Mr. Caldwell was not the proper officer to look after and adjust matters of the kind referred to in the question and answer of this witness. The question was certainly, of itself, no ground for setting aside the verdict of the jury, nor was that part of the answer which preceded the defendant's objection. If any part of the answer was objectionable, it was that given after the interruption, and to this no objection was made. But, if both the question and answer could be regarded as improper, the plaintiff in error must be held by this Court to have waived his objection thereto for the reason that he failed or declined to except to the ruling of the Court. *Washington, etc., v. Hobson*, 15 Gratt. 122; *Wickers v. B. & O. R. R. Co.*, 14 W. Va. 157.

The only remaining assignment of error is, that the verdict was contrary to the evidence. With the exception of the agreement between the defendant and the Keystone Coal Company hereinbefore mentioned, the evidence was entirely parol, taken down at the trial by a stenographer in the form of questions and answers, and thus incorporated in the bill of exceptions. This report of the testimony covers one hundred and thirty-two pages of the printed record. The testimony is conflicting and plainly of a character that precludes this Court from reviewing it to determine whether it does or does not sustain the verdict of the jury. *Morgan v. Fleming*, 24 W. Va. 186. The only use this Court can possibly make of it would be to ascertain the propriety or impropriety of the rulings of the Court in regard to the allowance or rejection of the evidence and instructions excepted to by the defendant during the trial. The Circuit Court should, therefore, have refused to give any bill of exceptions in this form, but should have certified the facts if it was intended to have this Court review the case on the question whether or not the verdict was warranted by the facts proved. But if it was intended merely to have this Court review the rulings of the Circuit Court in regard to the allowance or rejection of evidence or instructions excepted to by the plaintiff in error, then only so much of the evidence or facts should have been certified as would show the relevancy or irrelevancy of the evidence, or the pertinency or impertinency of the instructions excepted to. It is entirely clear that this Court cannot undertake, from the mass of contradictory testimony thus certified, to determine whether the verdict was warranted or not by the evidence. If, under the settled rule in such cases, all the parol evidence of the plaintiff in error in conflict with that of the defendants in error is rejected, very little of the exceptor's evidence will be left—certainly not enough, upon the most liberal view of it, to justify this Court in

holding that the verdict is not sustained by the evidence. *Sheff v. Huntington*, 16 W. Va. 307; *Black v. Thomas*, 21 Id. 709.

For the reasons aforesaid I am of opinion that the judgment of the Circuit Court should be affirmed.

Affirmed.

**Railroad Company using Track of Another Company.**—It has been uniformly held that when one railroad company uses the track of another upon which to run its cars, it is liable in damages for all injuries occasioned by defects in such track. *Murch v. Concord R. Corp.*, 9 Fost. (N. H.) 124; *Stetler v. Chicago & N. W. R. Co.*, 49 Wisc. 609; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534; s. c., 18 Am. & Eng. R. R. Cas. 1; *Patterson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. R. Cas. 180 and note.

See also *McElroy v. Nashua & Lowell R. Corp.*, 4 Cush. 400.

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TOPP et al.

v.

WEST SHORE AND ONTARIO TERMINAL COMPANY.

(46 *New Jersey Law Reports*, 84.)

Misjoinder of counts will support a demurrer to the whole declaration, but it is not a defect which will make an individual count bad. The demurrer being to the individual count, must be overruled.

An allegation that a railroad company knowingly permitted a third person to use the property of the defendant in a manner that was, per se, injurious to the adjacent land of plaintiff, imputes an actionable wrong to it.

On demurrer to narr.

A. Zabriskie for the plaintiffs.

A. Q. Garretson for the defendant.

VAN SYCKEL, J.—The action is in case. The first and third counts are in case, and the second count of the declaration is in trespass.

The defendant has demurred to the second count, and also to the third count.

The second count being a trespass is misjoined. Misjoinder of counts will support a demurrer to the whole declaration, but it is not a defect which makes the single count bad. The demurrer being to the individual count, must be overruled. *Kingdon v. Nottle*, 1 M. & S. 355; *Brill v. Neele*, 1 Chitty, 619 n.; 1 Chitty's Pl. 206.

The third count alleges that the defendant knowingly permitted a third person to use the property of the defendant in a manner that was, per se, injurious and destructive to the adjacent land of

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the plaintiff. The count, in substance, imputes co-operation of the defendant in the alleged wrongful act.

This count does not present the defendant in the character of an employer who employs an independent contractor to execute a work not in itself a nuisance. On the contrary, it charges that the undertaking was, per se, dangerous and destructive, and the alleged fact that the defendant permitted his property to be used for such purpose makes him a participant in the injurious act.

The rule which exempted the company from liability in *Cuff v. Newark & New York R. R.*, 6 Vroom, 17, is not applicable here.

There the work to be done was not in itself a nuisance, and the injury resulted from the negligence of a contractor exercising an independent employment.

Here the averments of the declaration show that without the assent of the defendants the alleged wrong could not have been perpetrated.

This fact brings the case within the legal principle upon which the judgment in *Del., Lack. & West. R. R. v. Salmon*, 10 Vroom, 299, was supported. In that case Justice Depue, after stating that the injury was caused by the locomotive of another corporation which was permitted by the defendant to use its track, said: "The defendants' road was under their management and control. The track and road-bed were under their control and possession, and if they knowingly suffered and permitted another company to make it a place of danger they are responsible in damages." See also *Pitts., Cinc. & St. L. R. Co. v. Campbell*, 86 Ill., 443.

The demurrer is not well taken to either count.

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**GRAND TRUNK RY. CO. OF CANADA**

**v.**

**ROSENBERGER.**

*(9 Supreme Court of Canada Reports, 311.)*

A was lawfully driving in his carriage along the highway. When within about 116 feet of a railway crossing a train passed which frightened the horse, so that he upset the vehicle, occasioning a severe injury to A. The engineer had omitted to give the statutory signal of the approach of the train when within eighty yards of the crossing. In an action by A against the company, *held*, that he was entitled to recover damages for the failure to sound the signal, notwithstanding the fact that the accident was not occasioned by collision with the train.

The statute requiring the sounding of the signal as aforesaid must be construed as inuring to the benefit of all persons who, using the highway which is crossed by a railroad on the level, receive damage either in person or

property from the failure of the company's servants to sound such signal, whether such damage arises from or is occasioned in any other manner by the neglect referred to.

**APPEAL** from the Court of Appeal for Ontario affirming the decision of the Common Pleas Division of the High Court of Justice discharging an order nisi to set aside the judgment entered for the plaintiffs, and the finding of the jury upon which said judgment was based, and to enter a judgment for the defendants, or for a new trial. See 15 Am. & Eng. R. R. Cas. 448.

The action was commenced by the respondents against the appellants on the 16th September, 1881, for injuries which they had severally sustained by being thrown out of a buggy on a highway in Berlin, near a crossing of the appellants' railway on the previous 9th of June.

The cause was first tried before Mr. Justice Galt and a jury, when, on answers to questions submitted to the jury, the judge entered a verdict and judgment for the respondents against the appellants.

This verdict was set aside by the Common Pleas Division, and a new trial was ordered, and leave was given to the respondents to amend their statement of claim, the court being of opinion that the original statement of claim did not show a good cause of action.

The statement of claim was then amended, so as to state the facts upon which the respondents relied to maintain their action, in the words following:

"Paragraph 2. On the evening of the 9th day of June, 1881, the plaintiffs were lawfully proceeding from the said town of Berlin to the town of Waterloo, in a carriage drawn by one horse, and upon and by the way of the highway leading from the said town of Berlin to the said town of Waterloo.

"Paragraph 3. In order to reach the said town of Waterloo it was necessary for the plaintiffs to cross the defendants' railway, in the said town of Berlin, where the said railway crosses the said highway on a level with the said highway.

"Paragraph 4. The plaintiffs proceeded upon the said highway to within a very short distance of the said railway, where it crosses the said highway, when a train upon the said railway in charge of the defendants' servants came along the said railway and proceeded to cross the said highway without giving the warning or signal of the approach of the said train, as required by the statute in that behalf, and when the said train had gone partly across the said highway the whistle upon the engine attached to the said train was then for the first time sounded, and the horse which the plaintiffs were driving took fright at the very close, unexpected and sudden appearance of the said train, became unmanageable, and upset the said carriage, and the plaintiffs were violently thrown to the

ground, and the said carriage was broken, and the said horse ran away, although during all the time aforesaid the plaintiffs drove the said horse with reasonable care and skill.

"Paragraph 4a. While the plaintiffs were proceeding upon said highway in the said carriage as aforesaid, and before the said carriage was upset as aforesaid, the said train (preceded by a locomotive engine attached thereto and forming part thereof) was being rapidly driven along and over the said railway in charge of the said defendants' servants, and thereupon it became and was the duty of the defendants to ring the bell, or to sound the whistle, which were upon the said engine, at least eighty rods from the place where the said railway crosses the said highway, and to keep the said bell ringing, or the said whistle sounding, at short intervals until the said engine had crossed the said highway, to warn persons travelling along the said highway of the approach of the said train, but the said servants of the defendants did not, nor did any other person, ring the said bell or sound the said whistle when approaching the said crossing, either at, or within, the said distance of eighty rods from the said point of intersection or crossing, but wholly neglected so to do, by reason whereof the plaintiffs were not warned of the said approach of the said train.

"Paragraph 5. No warning or signal of the approach of the said train towards the said highway on the occasion aforesaid was given as required by law. No bell was rung nor whistle sounded upon the said engine until the same was partly across the said highway, when the said horse immediately took fright and became unmanageable, through no fault of the plaintiffs, and entirely in consequence of the said negligence and carelessness of the said servants of the defendants.

"Paragraph 5a. Because no warning of the said train was given by whistling or ringing the bell as hereinbefore mentioned, the plaintiffs had reason to suppose that no train was then approaching the said railway crossing, and therefore being ignorant of their danger, and being unable to see or hear any approaching train, and believing that no train was coming, the plaintiffs drove with due care as aforesaid much nearer and closer to the said railway crossing than the plaintiffs would have gone on the occasion aforesaid if they had been warned by whistle or bell of the approach of the said train as required by law, and immediately thereupon, when the plaintiffs had proceeded to within a very short distance of the said railway, as mentioned in the fourth paragraph hereof, the said train came suddenly upon the said highway, and the said horse took fright at the said train, so that the said horse became unmanageable and upset the said carriage, and the plaintiffs then received the injuries hereinafter mentioned, and it was by reason of such neglect to ring the said bell or sound the said whistle as aforesaid that the plaintiffs sustained the damages hereinafter mentioned.

The appellants pleaded not guilty by statute.

The cause was tried a second time before Mr. Justice Patterson and a jury.

The learned judge after reading s. 104 of the Consolidated Statutes of Canada, ch. 66, put the following questions to the jury:

First—Has it been proved to your satisfaction that that duty was not performed? To which the jury answered yes.

Second—If you find the signal was given, but not so far as eighty rods from the highway, would it have been heard by the plaintiffs if they had been careful and listened so they could have avoided the accident? To which the jury answered yes, but said that they do not mean that the bell was rung.

Third—Was it a prudent thing for the plaintiffs to have driven the horse they did where the railway was to be crossed? To which the jury answered yes.

Fourth—Did the plaintiffs use such care as a reasonably cautious person would under the circumstances have used on approaching the railway? To which the jury answered yes.

The fifth question was not answered and is not material.

Sixth—If the plaintiffs had known the train was coming would they have stopped the horse farther from the railway? To which the jury answered yes.

The jury then assessed the damages of the respondents—Mary Rosetta, at \$600, and of Lydia Ann, \$500.

Upon these answers the learned judge entered a verdict for the respondents.

On the 18th May, 1882, the Common Pleas Division granted an order nisi to show cause why the judgment rendered for the plaintiffs, and the findings or verdict of the jury upon which the said judgment was based, should not be set aside, and a judgment entered for the defendants, on the ground that the plaintiffs could not maintain an action, as the defendants did not owe any duty to sound the bell or blow the whistle, so far as the plaintiffs were concerned, and on the ground that it was not established that the injury to the plaintiffs complained of was caused by the omission of the defendants to give the signal referred to, and on the ground that the omission to give the signal was not the proximate cause of the injury, or why the said findings should not be set aside and a new trial had between the parties, on the ground that the findings were against law and evidence, and the weight of evidence.

After arguments the order nisi was discharged, Justices Galt and Osler being of opinion that the action was maintainable, and that they could and ought to supply a finding of a matter of fact which the jury had not found. The Chief Justice dissented, holding that the action was not maintainable. The appellants then appealed to the Court of Appeal, and a majority of the judges of that Court affirmed the judgment of the Common Pleas Division. Mr.



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Justice Burton dissented, agreeing with the opinion of Chief Justice Wilson.

The present appeal was from the judgment of the Court of Appeal.

The evidence at the trial, besides the statements of the two respondents, consisted of persons in the neighborhood of the crossing, who stated that they did not hear the signals given, and some of them that if they had been given they would have heard them, while others gave evidence to show that either one or both signals were given. . The two respondents, who were driving a buggy, said that they did not hear the signals or hear even the noise of the approaching train till they saw it.

James Bethune, Q. C., for appellants.

Bowlby, Q. C., for respondents.

GWYNNE, J.—We are all of opinion that this appeal should be dismissed. We entirely concur in the opinion of the learned judges of the Common Pleas division of the High Court of justice, and of the Court of Appeal of the Province of Ontario, namely, that the benefit of the 104th section, chap. 66 of the Consolidated Statutes of Canada is not confined to the case of persons injured in person or property by actual collision with an engine or train crossing a highway. In the neighboring States, where a precisely similar enactment is inserted in railway companies Acts, the courts of law recognize no such limitation, and neither in the language of the clause, nor in reason, is there, in our opinion, anything which would justify such a limitation of the application of the clause. It clearly, as we think, applies to, and must be construed as inuring to, the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage, either in their persons or in their property, from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from collision or is occasioned in any other manner by the neglect referred to.

The learned judge before whom the case was tried submitted certain questions to the jury, accompanied by a most careful charge, of which the defendants have no just reason to complain, explaining the reason why each of such questions was put to them, so as to exclude all possibility of the jury failing to understand their object. He told them that the action was founded upon negligence in the defendants:

"It is alleged [he told them] that the railway company had a certain duty to perform, and that they neglected that duty, and that it was by reason of that neglect that the accident happened, and [he told them] to bear in mind these two or three principles, because all these things have to be established to entitle the plaintiffs



to recover. They must satisfy you [he said] not merely that the defendants neglected their duty, but that the neglect caused the injury. It is not sufficient for them to show that the railway company neglected to do something which by the statute they were bound to do; they must go further, and satisfy you that the injuries were in no degree caused by their neglecting something which they themselves should have done. I want you [he said] to understand as clearly as I can explain it, the grounds upon which the plaintiffs, if entitled to recover, must establish their claim. They must show, before they are entitled to recover, that what has happened was brought about by no fault of their own—not by neglect of anything which they should have done, or which persons who were reasonably cautious and careful would have done under the same circumstances. It must appear that what happened to them was occasioned altogether by the fault of the company—I mean, of the persons who were running the train and who represent the company for this purpose. The company [he said] is bound to ring the bell or sound the whistle, and that signal or one of those signals, it does not matter which, has to be repeated at short intervals, not kept continuously going, until the train crosses the highway, the signal to commence at the distance of eighty rods. The company are liable to a penalty if they neglect that duty, whether any person is hurt or not. It does not, however, follow, if this duty is neglected that necessarily the person who suffers has a right of action. If a person neglects proper caution upon his part, if he has the means of seeing that the train is coming and if his own carelessness has something to do with bringing about the accident which occurs, he cannot excuse himself and claim damages against the railway company because they neglected to give the signals. If he could, by keeping his eyes and ears open, have protected himself, he cannot hold the company responsible. The case is not made out unless the jury are satisfied that the accident was caused altogether by the negligence of the company.”

With these preliminary observations and further observations to the like effect, he submitted to the jury the following questions. It was the duty, he said, of the persons in charge of the locomotive to sound the whistle or ring the bell at the distance of at least eighty rods from where the rails cross the highway, and to keep the bell ringing or the whistle sounding at short intervals, until the train had crossed the highway, and he put this question :

“1st. Has it been proved to your satisfaction that that duty was not performed?”

The learned judge further explained to the jury that he put the question in that shape because he was of opinion that the onus lay upon the plaintiffs to prove, not merely that the train fright-

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ened their horse, and so caused the damage, but that the whistle was not sounded nor the bell rung, and he added :

“ If you are satisfied, upon the evidence, that the whistle was not sounded nor the bell rung, either one or the other of them during this space of eighty rods, you will answer ‘ yes.’ If you are satisfied that the bell was rung or the whistle sounded during that distance, or if it is left doubtful, you should answer ‘ no,’ because the question is, are you satisfied that it was so ?”

“ 2d Question.—If you find the signal was given, but not so far as eighty rods from the highway, would it have been heard by the plaintiffs if they had been careful and listening, so that they could have avoided the accident? Was there such signal as those people should have heard if they had listened ?”

The learned judge then drew the attention of the jury to the whole of the evidence bearing upon these two questions, in a very careful manner, and concluded that it was for the jury to weigh the probabilities and to decide upon the evidence as they should think proper. The evidence was certainly contradictory, but it was for the jury to say which side they believed, and there cannot be, nor is there, any complaint as to the manner in which it was left to them by the learned judge. The jury answered the first question in the affirmative, thereby establishing that they were satisfied that the bell had not been rung, nor the whistle sounded, as required by the clause of the statute. The second question they all answered in the affirmative, adding that by this answer they did not mean that the bell was rung. Conveying their meaning to be that if the signal required by the statute, which, by their answer to the 1st question, had not been given, had been given, it would have been heard by the plaintiffs, so as to have enabled them to avoid the accident.

“ 3d Question.—Was it a prudent thing for the plaintiffs to have driven the horses they did where the railway had to be crossed ?”

And he asked this question in view of the evidence given by witnesses who spoke as to seeing the plaintiffs when they started out.

“ 4th Question.—Did the plaintiff use such care as a reasonably cautious person would, under the circumstances, have used in approaching the railway ?”

This question he accompanied with these further observations :

“ People [he said] are bound to use reasonable care. You are not to have in your mind’s eye a timid woman or a rash man, but a person of reasonable caution, able to manage the horse and to drive. Did they act as such? Did they do anything they should not have done, or did they omit to do anything they should have done? Should they have stopped to listen? Did they omit to do anything that a reasonable person, under the same circumstances, would have done ?”

The jury answer these 3d and 4th questions in the affirmative, thereby conveying their opinion to be, as I think, in view of the charge of the learned judge accompanying the question, we must understand them, that the plaintiffs were not guilty of any contributory negligence.

“ 5th Question.—What ought they have done which they did not do ?”

To this question the jury gave no answer, from which circumstance the natural and fair inference is that they could not say that the plaintiffs could have done anything to avoid the accident which they did not do. The learned judge, then, premising that there was still another question which he would put to them, and which touched the right of the plaintiff to recover, and that was, did they stop their horse as soon as they knew that there was danger, put this 6th question :

“If the plaintiffs had known the train was coming, would they have stopped the horse farther from the railway ?”

Which question the jury answered in the affirmative. To the 7th question, which was as to the amount of damages the plaintiffs should receive, the jury answered that one should receive \$600 and the other \$500.

Now, that these answers given to questions accompanied by such clear explanation from the learned judge of what, in his opinion, the jury should be satisfied before the plaintiffs could recover, were intended by the jury to be taken as a verdict for the plaintiffs, and that the entry of a verdict upon them for the plaintiffs by the learned judge was a proper entry, cannot, we think, admit of a doubt. It is, however, now objected by the learned counsel for the defendants that the 6th question is too vague to warrant the conclusion being drawn, from the affirmative answer of the jury to it, that the accident would not have happened even if the signals required by the statute had been given; but admitting that this question might have been put more clearly, we cannot, in view of all the questions and of the whole charge of the learned judge accompanying them, doubt that the intention of the jury by their answers to all the questions, taken as a whole, was to convey their opinion to be that the neglect of the defendants' servants to give the signals required by the statute to be given was the sole cause of the accident, and that the plaintiffs were not guilty of any contributory negligence; and we think that the answers so given did warrant a verdict and judgment to be entered for the plaintiffs. When questions are submitted to a jury, as they were in this case, if counsel for the defendants should be of opinion that they are not framed so as to elicit answers which would enable the court thereupon to enter a verdict for the plaintiff or defendant, they should object at the time when, if necessary, the question or questions objected to or omitted could be amended or supplied,

and if he fails to do so he should not, after running the chance of the jury answering the questions put in a sense favorable to his client, and failing in that expectation, be heard to make the objection, unless at least the defect in the questions is so apparent that the ends of justice seem to demand their rectification. In the present case we do not think there is any such defect, or any such ambiguity as to how judgment should be entered upon the answers of the jury, as would require us to send this case to another jury. Upon the only objection which was taken by the learned counsel for the defendants, when the questions were submitted to the jury, namely, that the learned judge should have told the jury that the proximate cause of the accident being the appearance of the train, there is no cause of action, we are of opinion that, for the reasons given by the majority of the learned judges in the court below, this objection cannot prevail. As to the point taken, that the findings of the jury are against the weight of evidence, we cannot say that this is so. The evidence was contradictory, no doubt, as in cases of this kind it always is, but two courts below have concurred in the opinion that the findings of the jury are not against the weight of evidence. To justify us in arriving at a contrary conclusion, the onus lies upon the defendants to establish their contention beyond all reasonable doubt, and this, it is sufficient to say, they have failed to do.

Appeal dismissed with costs.

**General Reference.**—For a full collection of the authorities on the points discussed in the principal case see *Ransom v. Chicago, St. P., M. & O. R. Co.*, and note, *infra*.

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## RANSOM

v.

CHICAGO, ST. P., M. AND O. RY. CO.

(*Advance Case, Wisconsin. January 13, 1885.*)

The hazards intended to be provided against by Rev. St. of Wisconsin, 1878 § 1809, requiring railroad companies to sound the whistle and ring the bell before crossing any highway, were (1) the danger of actual collisions at the crossings; and (2) of damages by the frightening of teams upon the public highway near such crossings; and if the failure to give such signals when approaching a crossing causes an injury to persons driving, in the exercise of proper care, on a highway running parallel with the track, the company will be liable.

**APPEAL** from Circuit Court, Eau Claire County.

This is an action to recover the expenses resulting from injuries to the plaintiff's minor children, for loss of their services, and for damage to his horse, buggy, and harness, which injuries and dam-

age are alleged to have been inflicted near the crossing of a public highway by the defendant's railway, and to have been caused by the failure of the defendant's servants running and managing one of its locomotives with a train of cars attached thereto, approaching such crossing, to ring the bell and blow the whistle of the engine, as required by statute. This appeal is from an order of the Circuit Court sustaining a general demurrer to the complaint. It appears from the complaint that the railway of the defendant runs from northwest to southeast across sections 2 and 12 in township No. 27, in the town of Union, Eau Claire County, and that it crosses a public highway located on the line between sections 11 and 12, in said township, near the northwest corner of the latter section. There is also an east and west highway on the south line of section 2, nearly parallel with the railway, which intersects the north and south highway at or near the railway crossing. As the railway approaches the crossing from the west, it passes through a deep cut 25 or 30 rods in length, because of which, and of a dense growth of small timber between the railway and the highway, and an elevation between, persons travelling the east and west road cannot see passing trains from the west for some distance, and until the crossing is nearly reached; and the topography of the ground between is such that it is difficult to hear trains or know of their presence there unless the whistles of the engines are sounded and the bells rung. The east and west road approaches the crossing from the west on a descending grade. On December 2, 1883, the plaintiff's wife, accompanied by their two minor children, was driving a horse of the plaintiff, hitched to his buggy, on the east and west road, from the west towards the railway crossing. When within 10 or 15 rods of the crossing, and near the railway, a train of cars from the west, running very rapidly, suddenly, and without notice or warning, emerged from the cut and so frightened the horse that he ran away, turned into the north and south road, and overturned the buggy, killing the plaintiff's wife, severely injuring his children, and greatly damaging his horse, buggy, and harness. It is also alleged that the horse was gentle and well trained; that the plaintiff's wife was accustomed to drive the horse, and was an experienced driver of horses; that she and her children who were with her in the buggy exercised due and proper care to avoid the accident; that neither of them saw or heard the approaching train, or knew it was coming until it emerged from the cut; that the engine whistle was not blown or bell rung; and that had those signals been given, as the statute requires, the occupants of the buggy would have known of the approach of the train in time to have guarded against and avoided the accident.

Alex. Meggett for appellant.

John I. Howe for respondent.

LYON, J.—Independently of the fact that the defendant's locomotive and train of cars were near the highway and railroad crossing when they emerged from the cut, and frightened the horse being driven on the adjacent highway by the plaintiff's wife, we think the defendant would have been under no obligation either to slacken the speed of the train or give any signal of its approach. There is no statute, and we are aware of no common-law rule, which, under such circumstances, requires railroad companies to observe those precautions to avoid accident. If, therefore, the defendant is liable in this action, it is so because it failed to comply with the requirements of the statute prescribing its duty when its train approached the crossing of the highway. The statute provides that "before crossing any highway, except in cities and villages, with any locomotive, the whistle shall be blown eighty rods from such crossing, and the engine-bell rung continuously from thence until the highway shall be crossed by the locomotive." (Rev. St. p. 527, § 1809.) Under this statute no negligence or breach of duty can be imputed to the defendant because of the speed of the train. The case made by the complaint is that the whistle was not sounded, or the bell rung, when the train approached the crossing, and that the failure to do so was the proximate cause of the injuries complained of. It is doubtless true that unless the defendant owed the duty to the plaintiff's wife and children to blow the whistle and ring the bell, the complaint fails to state a cause of action. But if it owed them such duty, then the complaint states a cause of action. These propositions are illustrated by some of the cases cited by counsel for the defendant. Thus it was held in *Harty v. Railroad Co.*, 42 N.Y. 468, that the sole object of a statute of New Jersey, similar to ours, was to protect persons travelling the highway at or near the crossing, and that the railroad company owed no duty to a person injured by a passing train, when such person was on the track near a crossing (although lawfully there), to blow the whistle or ring the bell. Hence it was held that a failure to give the signals required by the statute did not render the railroad company liable for such injuries. To the same effect is *O'Donnell v. Railroad Co.*, 6 R. I. 211.

The controlling question in this case is, therefore, did the defendant company owe the duty to the plaintiff's wife, and their children who were with her in the buggy, to give the signals required by the statute of the approach of its train to the crossing?

It was maintained in the argument on behalf of the defendant that the statutory precautions have no application to a person travelling a highway parallel with the railroad, but only to those travellers on the highway who are about to use the crossing. The highway along which plaintiff's wife was driving, when her horse became frightened and unmanageable, was substantially parallel with the railroad at the place of the accident, and the complaint



does not allege that she intended to or was about to drive across the railroad. None of the cases cited by counsel to these propositions seems to sustain the doctrine contended for, with the single exception of the case of *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea (Tenn.), 103; s. c., 15 Am. & Eng. R. R. Cas. 446. The court gave a construction to the statute of that State which, to some extent, sustains the position of counsel for defendant. It seems to us that the case was entirely outside the statute, and called for no construction thereof. In that case, the facts, as stated by the court, were these: "Plaintiff and his wife were riding horseback from church. The road they chose to travel, after crossing the railroad, ran along, near, and parallel to the railroad for probably a mile or more. Plaintiff and wife were riding along this road, going east, having passed the crossing from a quarter to half a mile west of where the public road crossed the railroad, when a train approached from the west, going east, the noise of which frightened the wife's horse, which threw her and injured her severely." From this statement, although somewhat obscure, it is understood that the injured person was more than a quarter of a mile from the crossing when her horse became frightened and threw her, and it is a fair inference from the statement that the train of cars was an equal distance therefrom at the same time, and had passed the crossing. The statute required the signal to be sounded when the locomotive was approaching, and one fourth of a mile from the crossing. Hence, at the place of the injury, the railroad company was under no statutory obligation to sound any signal. The court held that it was under no such obligation to the plaintiff and his wife. Under the facts, no good reason is perceived why it might not have been held as well that the company was under no such obligation to any person. In the other cases cited by defendant's counsel, either the persons injured were not upon the highway when injured, or, being upon the highway, they were charged with contributory negligence. The *New York and Rhode Island* cases above cited, and also *Holmes v. Railroad Co.*, 37 Ga. 593, and *Elwood v. Railroad Co.*, 4 Hun, 808, belong to the former class. The cases of *Fletcher v. Railroad Co.*, 64 Mo. 484, and *Haas v. Railroad Co.*, 47 Mich. 401, s. c., 8 Am. & Eng. R. R. Cas. 268, belong to the latter class.

On the other hand, as we have already seen, the case of *Harty v. Railroad Co.*, 42 N. Y. 468, holds that the statute was enacted for the protection of persons travelling the highway at or near the crossing. It does not exclude from the protection of the statute travellers on the highway who do not intend to use the crossing. In the opinion by Earl, C. J., the following language of Allen, J., in *People v. New York Cent. R. Co.*, 25 Barb. 199, is quoted approvingly: "The hazards to be provided against were twofold: (1) the danger of actual collision at the crossing; and (2) that of

damage by the frightening of teams travelling upon the public highway" near the crossing. In the latter case, the court was considering a statute of New York in principle precisely like ours. The track of the railroad crossed the highway at an elevation of 15 feet above it. Hence, in that case, there was no possibility of a collision. Yet the court held that persons travelling the highway in the vicinity of the crossing were within the protection of the statute, and that the railroad company owed them the duty to ring the bell and blow the whistle, as required by the statute. Cases elsewhere give support to the same doctrine. See *Wakefield v. Railroad Co.*, 37 Vt. (2 Veazey) 330; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259; 1 Thomp. Neg. 352, and cases cited. The present case rests upon the same principle, for it can make no difference whether the traveller upon the highway passes under the railroad or on a parallel road in the vicinity of the crossing. The danger of collision is eliminated from both cases, and the danger of teams becoming frightened is common to both. We think the construction thus given to the New York statute by the courts of that State is most reasonable and sensible, and is sustained by the weight of authority. We do not hesitate to adopt it as the true construction of our own statute. It must be held, therefore, that, upon the case made by the complaint, the defendant company owed the duty to the plaintiff's wife and children to give the signals required by the statute when its locomotive and train were approaching the crossing. Its failure to do so was negligence; and if the plaintiff can satisfy the jury that it did so fail, and that such failure was the proximate cause of the injuries complained of, he ought to recover. We conclude that the complaint states a cause of action, and the demurrer thereto should have been overruled. Order reversed, and cause remanded for further proceedings according to law.

**Company Liable for Injury at Crossing caused by Failure to Sound Statutory Signals.**—A railroad company is invariably held liable in damages when a person is injured at a street or road crossing in consequence of the failure of an engineer upon an approaching train to give the signal required by law. *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189; *Galena, etc., R. Co. v. Dice*, 22 Ill. 264; *Chicago, etc., R. Co. v. McKean*, 40 Ill. 218; *St. Louis, etc., R. Co. v. Terhune*, 50 Ill. 151; *Chicago, etc., R. Co. v. Fears*, 53 Ill. 115; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Chicago, etc., R. Co. v. Notzki*, 66 Ill. 455; *Peoria, etc., R. Co. v. Stilman*, 67 Ill. 72; *Chicago, etc., R. Co. v. Bell*, 70 Ill. 102; *Georgia R. & B. Co. v. Wynn*, 42 Ga. 331; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484.

**Company not Liable to Trespasser on Track for Failure to Sound Statutory Signals at Crossings.**—A statute requiring the sounding of signals on approaching a crossing is intended only for the protection of persons travelling along the highway. It is not intended to protect persons walking upon the railroad-track near the crossing, and cannot be invoked by them. *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211; *Philadelphia & Reading R. Co. v. Spearen*, 47 Pa. St. 300; *Elwood v. New York Central & H. R. R. Co.*, 4 Hun (N. Y.), 508; *Harty v. Central R. Co. of N. J.*, 42 N. Y.



468; *Holmes v. Central R. & B. Co. of Ga.*, 37 Ga. 598; *Bell v. Hannibal & St. Jo R. Co.*, 4 Am. & Eng. R. R. Cas. 580.

**Frightening Horses by failing to Sound Statutory Signals.**—A statute of the character indicated above is also intended to protect persons lawfully travelling along the highway at or near the crossing from approaching so close that their horses may be frightened by a passing train. When in consequence of a failure to give the signal the party in question is induced to approach too close and his horses become frightened, the company is liable. *Wakefield v. Connecticut, etc., R. Co.*, 37 Vt. 380; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259; *People v. New York Central R. Co.*, 25 Barb. (N. Y.) 199; *Prescott v. Eastern R. Co.*, 113 Mass. 370; *Pollock v. Eastern R. Co.*, 124 Mass. 158; *Texas & Pacific R. Co. v. Chapman*, 57 Tex. 75; *Flint v. Norwich & Worcester R. Co.*, 110 Mass. 222; *Strong v. Placerville R. Co.*, 8 Am. & Eng. R. R. Cas. 278; *Grand Trunk R. Co. v. Rosenberger*, 15 Am. & Eng. R. R. Cas. 448; s. c., *supra*.

The company is not liable when the party has passed the crossing. *Wilson v. Rochester, etc., R. Co.*, 16 Barb. 167. But see, contra, *Western & A. R. Co. v. Jones*, 8 Am. & Eng. R. R. Cas. 267.

Nor where a team is tied up so close to a crossing as to be liable to be frightened by a passing train. *St. Louis & San Francisco R. Co. v. Payne*, 13 Am. & Eng. R. R. Cas. 632.

**Injuries to Persons not Crossing Track.**—When the failure to sound a statutory signal causes injury as in the principal case to persons riding along a highway running parallel with the line of the railroad but not crossing it, it has been held that the statute has no application and that there can be no recovery. *East Tenn., Va. & Ga. R. R. Co. v. Feathers*, 10 Lea (Tenn.), 108 s. c., 15 Am. & Eng. R. R. Cas. 446. But see, contra, *Ransom v. Chicago, St. P., M. & O. R. Co.*, *supra*.

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## INTERNATIONAL AND GREAT NORTHERN RY. CO.

v.

SMITH.

(*Advance Case, Texas. Oct. 21, 1884.*)

Persons operating a railroad train, seeing a person on the track in front of the train, may presume that he will get off in time to avoid a collision.

If those operating the train know the person to be deaf and not able to hear the ordinary noise of the train, their duty is entirely different. They cannot presume that he will leave the track, but must use all proper precaution demanded by the situation.

If the negligence of the company occurs after knowledge of the dangerous condition of the party, their employees managing the train being aware of the infirmity of the party in danger, they are responsible. The case is much stronger when the damage occurs from their wilful negligence or gross carelessness.

APPEAL from Smith County.

Herndon and Cain for appellant.

Robertson and Finley for appellee.

**WILLIE, C. J.**—The statement of facts has been stricken from the transcript in this cause upon motion of the appellee. [4 Texas Law Review, 252.] We can, therefore, consider only such assignments of error as do not depend for their support upon the evidence introduced upon the trial below.

The first assignment of error calls in question some of the allegations of the petition as being insufficient in law to entitle the plaintiff to recover. The proposition under this assignment is to the effect that the allegations show that contributory negligence on the part of the deceased was the proximate cause of his death. To determine this we must take all the allegations of the petition as to the cause and manner of his death in connection and construe them together.

It is alleged that Smith, the deceased, was deaf, and that at the time of the accident he was walking upon the railroad track of the defendant company, which had been laid upon and along a public street in the city of Tyler. This street is stated to have been between the residence and place of business of the deceased, and that it was necessary for him to cross and make use of it in going from one to the other; that at the time the accident occurred it was about dark; that a train, which consisted of an engine and tender, and a box car before and one behind them, was running along the track in the direction of the deceased and following him; that this train was being backed, and was going at the rate of fifteen miles per hour—a greater rate than was allowed by the laws of the city of Tyler; that there were no lights upon the train, and no signals were given to warn Smith of his peril; that he, being ignorant of the approach of the train and using all necessary precaution on his part, was run over by the train and instantly killed. It was further alleged that Smith did not hear the approach of the train, and that although his deafness was well known to the very agents and employees of the company who were running the train, and although they knew that the deceased was in the way of the train and unable to hear or know of its approach, they continued to run at the same high rate of speed until they ran over and killed him.

It is doubtless well established law that the persons operating a railroad train, seeing one upon the track in the direction it is going, have a right to presume that he will step off in time to avoid a collision. They have a right to presume that the principle of self-preservation will impel the trespasser to seek a place of safety and not await what must result in serious injury, if not in death. If, however, the person on the track be deaf and unable to hear the noise of the train, he cannot be expected to provide for his own safety so promptly as one in full possession of all his senses. This fact would, of course, make him the more careful to avoid being placed in a situation likely to render him liable to an injury from which others would be exempt. But what are the duties and re-

sponsibilities of the railroad company in such case? If unaware of the person's infirmity, they cannot be expected to treat him differently from other like transgressors upon their track. They may presume that he will step off in time to prevent being struck by the train, and they would be required to give him only such warning as would reasonably alarm his fears and cause him to leave the track. But if the employees in charge of the train know that the party is deaf and not able to hear the ordinary noise of the train, their duty becomes entirely different. The presumption that he will leave the track, which excuses the company in other cases, does not exist, and they have no right to act upon it; but they must use all proper precautions demanded by the situation, and if they do not, they will be liable for the consequences, notwithstanding the original negligence of the deaf person in attempting to walk the track of the railroad.

Any infirmity of one travelling upon the track, or lying upon it, known to those in charge of the particular train, requires such diligence on the part of the company as will best protect him from harm. The original negligence of the person injured does not excuse the company from care and watchfulness on their part, when they know that his dangerous position is due to an infirmity or disability, deafness, idiocy, incapacity for moving, or want of appreciation of the danger, as in case of an infant of tender years.

If the negligence of the company occurs after they are aware of the dangerous condition of such party, their employees managing the cars being fully aware of the infirmity of the party imperilled, they are responsible for the damages suffered by him. Much stronger is the case against the company when, under such circumstances, the damages ensue from their wilful negligence or gross carelessness. These principles are borne out by the books, and reference is made to a few of the authorities in which they will be found well sustained. *H. & T. C. Ry. Co. v. Smith*, 52 Texas, 178; *Frech v. Phil., etc., R. R. Co.*, 39 Md. 574; *Varnell v. St. Louis, etc., R. R. Co.*, 10 Am. & Eng. R. R. Cas. 726; *Beem's Adm'r v. Ch., R. I. & Pac. R. R. Co.*, 6 Id. 222; *Swigert v. Han. & St. Jo R. R. Co.*, 9 Id. 822; *Louisville, etc., R. R. Co. v. Cooper's Adm'r*, 6 Id. 5.

The petition shows that Smith was deaf and perhaps negligent in walking upon the track when he was liable to be injured by a moving train. But it shows, also, that the employees of the company in charge of the train were well aware of his deafness; saw him walking on the track and liable to be run over and killed by reason of not being able to hear the train coming toward him; that they took no precaution whatever to save his life; gave no alarm, exhibited no lights, did not slacken their speed, much less attempt to stop altogether; but, in the exercise of gross carelessness,

continued to back the cars at the rate of fifteen miles an hour, until they struck and killed the deceased.

We think that, taking all the allegations of the petition in connection, a sufficient case of negligence on the part of the company is made out to have occurred after they knew of the danger to which Smith was subjected on account of his deafness and the movement of the train toward him, and that the petition showed a good cause of action, and the demurrer was properly overruled.

The charge of the court complained of in the fifth assignment of error was in accord with these views, and was correct under the allegations of the petition. For want of a statement of facts, we cannot pass upon its applicability to the evidence in the case.

The petition does not show that exemplary damages were claimed by the plaintiff. It was not, therefore, the duty of the court to give any instructions upon that subject, or to distinguish between exemplary and compensatory damages. If the defendant desired to have the claim for damages more specially alleged, it should have specially excepted to the petition. If it had desired the charge to be more specific in this respect, it should have asked special instructions of the court.

There are no other errors assigned of which we can take notice in the state of the record.

The judgment is affirmed.

Affirmed.

**Engineer may Presume that Party Ahead on Track has Ordinary Faculties.**—When the persons in charge of a railroad train see a party ahead upon the track, they are entitled under ordinary circumstances to presume that he is endowed with ordinary faculties, and that he will therefore take notice of the approaching train and step off the track in time to avoid injury. *Harty v. Central R. Co.*, 42 N. Y. 468; *Frech v. Philadelphia, etc., R. Co.*, 39 Md. 574; *Manly v. Wilmington, etc., R. Co.*, 74 N. C. 655; *Illinois, etc., R. Co. v. Modglin*, 85 Ill. 481; *Herring v. Wilmington, etc., R. Co.*, 10 Ired. L. (N. C.) 402; *Poole v. North Carolina, etc., R. Co.*, 8 Jones L. (N. C.) 340; *Maher v. Atlantic, etc., R. Co.*, 64 Mo. 267; *Holmes v. Central, etc., R. Co.*, 37 Ga. 593; *O'Donnell v. Missouri, etc., R. Co.*, 8 Cent. L. J. 414; *Coggsell v. Oregon & Cal. R. Co.*, 6 Oreg. 417; *Louisville, etc., R. Co. v. Cooper*, 6 Am. & Eng. R. R. Cas. 5; *Teunenbroock v. Southern P. C. R. Co.*, 6 Am. & Eng. R. R. Cas. 8; *Northern Central R. Co. v. State*, 6 Am. & Eng. R. R. Cas. 66; *Colorado Central R. Co. v. Holmes*, 8 Am. & Eng. R. R. Cas. 410; *International & St. N. R. Co. v. Jordan*, 10 Am. & Eng. R. R. Cas. 301; *Baltimore & Ohio R. Co. v. Depew*, 12 Am. & Eng. R. R. Cas. 64; *Terre Haute & Ind. R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas. 77; *Louisville & N. R. Co. v. Watkins*, 12 Am. & Eng. R. R. Cas. 89.

**Duty of Engineer when he Knows that Party has not Ordinary Faculties.**—But where the persons in charge of a train have any knowledge of the fact that the person is under some physical disability which will prevent his leaving the track, they are bound to a higher degree of care. *Frech v. Phila., W. & B. R. Co.*, 39 Md. 574; *Meeks v. Southern Pacific R. Co.*, 56 Cal. 513; s. c., 8 Am. & Eng. R. R. Cas. 314; *East Tenn., Va. & Ga. R. Co. v. Humphreys, Adm'r*, 12 Lea (Tenn.), 200; s. c., 15 Am. & Eng. R. R. Cas. 472; *Dinwiddie, Adm'r, v. Louisville & Nashville R. R. Co.*, 9 Lea

(Tenn.) 809; s. c., 15 Am. & Eng. R. R. Cas. 488. But see *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615; s. c., 6 Am. & Eng. R.R. Cas. 11; *Paducah & Elizabethtown R. Co. v. Letcher*, 12 Am. & Eng. R. R. Cas. 61.

## BURNETT

v.

## BURLINGTON AND M. R. R. Co.

(*Advance Case, Nebraska. August 6, 1884.*)

An employee of a railroad company is incompetent to sit as a juror in a case where the company is a party.

If a challenge to an incompetent juror is overruled, and he is afterwards peremptorily challenged and excluded, and the record fails to show that the party exhausted his peremptory challenges, the error in overruling the challenge for cause will be without prejudice.

G., a boy between 10 and 11 years of age, while walking on a railroad at a point where there was no thoroughfare, by accident stepped between the guard and main rail at a switch, and was unable to extricate his foot, and a switch-engine being turned on to that line ran over and crushed his foot. *Held*, that if the employees of the company, after becoming aware of the perilous condition of the plaintiff, by the exercise of a reasonable degree of care could have prevented the injury, the company was liable.

ERROR from Cass County.

A. N. Sullivan and J. B. Strode for plaintiff.

Marquette & Dewese for defendant.

MAXWELL, J.—This action was brought by the plaintiff against the defendant to recover for personal injuries alleged to have been caused by the negligence of the employees of the defendant in running one of its locomotives. On the trial of the cause in the court below a verdict was rendered in favor of the defendant, and the action dismissed.

The first error assigned is in overruling the challenge to one B. Hempell, called as a juror. The examination of Mr. Hempell is as follows: "*Question.* Are you in the employ of the defendant at present? *Answer.* I am, sir." (The attorneys for the plaintiff thereupon challenged the juror for cause.) "*Q.* By the Court. What position do you occupy? *A.* I work in the carpenter shop. *Q.* By the Court. Are you, of your own knowledge, acquainted with any of the facts in this case? *A.* I am not. *Q.* By the Court. Do you have any opinion, at the present, as to which party should prevail? *A.* No. *Q.* By the Court. Have you ever formed or expressed an opinion as to which party should prevail? *A.* No. *Q.* By the Court. Have you any bias or prejudice in favor of or

against either of the parties to this action? A. No, sir; that I know of at present." The challenge was thereupon overruled, to which the plaintiff excepted.

A note is made in the record by the judge that "after the challenge for cause was overruled by the Court, the plaintiff peremptorily challenged the juror, B. Hempell, who was thereupon excused." At common law it is good cause for challenge that a juror is next of kin to either party within the ninth degree; that he has been an arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor or attorney. 3 Bl. Comm. 363. And the common law in that regard is in force in this State. *Ensign v. Harney*, 18 N. W. Rep. 74. Jurors must be indifferent with the parties, and have neither motive nor inducement to favor either. The fact that the defendant is a corporation does not change the rule, nor render an employee eligible to sit on a jury in an action where the corporation is a party. The Court, therefore, erred in overruling the challenge. But as it appears that the juror was challenged peremptorily and excluded from the jury, and the record fails to show that the plaintiff exhausted his peremptory challenges, it was error without prejudice. *Palmer v. People*, 4 Neb. 68; *Freeman v. People*, 4 Denio, 10.

2. Dr. Livingston, of Plattsburgh, the defendant's principal surgeon, was called as a witness for the plaintiff, and testified to the extent of the injuries. He was then asked by the defendant's attorney whether or not his services for attendance on the boy were paid for by the boy or his mother, or any one for them. The plaintiff's attorneys objected to the question, because there was no claim for compensation for such services. The objection was overruled, and he answered that "the treatment, and all the supplies necessary to the treatment, were supplied without cost to the patient." "Question. That is the rule in all cases? Answer. That is the rule in all cases." Had there been any claim in the petition for compensation, because of money expended for this purpose, the question would have been proper. But nothing is claimed on that ground, and the answer must have been prejudicial by diverting the attention of the jury from the real question at issue.

3. It appears from the record that in August, 1882, the plaintiff, who was then between 10 and 11 years of age, was walking on the defendant's railroad track, in the city of Plattsburgh, at a point on or near Second Street, about thirty-three feet north of the north line of Main Street. Second Street at that point is covered with railroad tracks, and is not used by the public at large. The defendant's depot is a short distance east of Second Street, and a few feet south of Main Street, and persons in passing to and from the



depot are compelled to cross nearly all of said tracks. The plaintiff in his testimony states: "I was walking along the track and my foot slipped into the guide-rail and got fast there, and the engine was standing still, close to where the switchman was, and I stood there, and when I saw the engine coming it was on the track that goes to the river. He came to the switch." "*Question.* Who come to the switch? *Answer.* Mr. Lee Parker. He put the switch on my track; he got on the engine and jumped off again and caught me, and the engine ran over me, and never stopped till it got even with the other side of Main Street." He also states that he was thirty or forty feet from the switch at the time of the accident, and that when the switch was turned for the engine to pass over the track he hallooed and attracted the attention of a number of persons; that the switchman ran to him ahead of the engine and tried to extricate him, but finding that he was unable to do so, pulled his body over from the track, the injury sustained being the crushing of the foot, which was afterwards amputated, the heel being saved.

The fifth instruction given by the Court on its own motion is as follows: "Although the jury may believe from the evidence that the defendant was guilty of negligence, upon the occasion in question, which contributed directly to the injury complained of, yet if you further believe from the evidence that the plaintiff was also guilty of negligence which contributed directly to the injury, then the plaintiff cannot recover in this suit, unless the jury further find, from the evidence, that the conduct of the defendant's servants was malicious and wilful, or wantonly reckless, showing an utter disregard of the rights of the person of the plaintiff." This instruction was clearly erroneous. It entirely takes away from the jury the question of care on the part of the defendant. The rule is well settled that a party who is injured by the mere negligence of another cannot recover for the injury if he, by his ordinary negligence or wilful wrong, proximately contributed to produce the injury complained of, so that, but for his co-operating fault it would not have occurred, except where the approximate cause of the injury is the omission of the defendant, after becoming aware of the danger to which the plaintiff is exposed, to use a proper degree of care to avoid injuring him. *Serg. & R. Neg.* § 25; *C., O. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Brown v. Hannibal, etc., R. Co.*, 50 Mo. 461; *Railroad Co. v. Davis*, 18 Ga. 679; *Cooper v. Central R. Co.*, 44 Iowa, 134; *Cooley, Torts*, 674; *Trow v. Railroad Co.*, 24 Vt. 487; *Isbell v. Railroad Co.*, 27 Conn. 393; *Hicks v. Railroad Co.*, 64 Mo. 480. If, therefore, the employees of the defendant in charge of the locomotive, after being aware of the perilous condition of the plaintiff, did not exercise a reasonable degree of care to prevent the injury, the defendant cannot rely on the plaintiff's negligence to defeat a recovery.

Some of the instructions asked should have been given, but, as they are within the rule above stated, it is unnecessary to review them.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

**Stockholder not Competent as Juror.**—In an action to which a railroad company is a party, a stockholder in the company is not competent to sit as a juror. *Silvis v. Ely*, 3 W. & S. 421; *Williams v. Smith*, 6 Cow. 166; *Fleeson v. Savage S. M. Co.*, 3 Nev. 157; *Page v. Contocook Valley R. Co.*, 21 N. H. 438; *Peninsular R. Co. v. Howard*, 20 Mich. 18; *Ga. R. R. Co. v. Hart*, 60 Ga. 550.

But see *Michigan, etc., R. Co. v. Barnes*, 40 Mich. 383; *Commonwealth v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 25; *Williams v. Great Western R. Co.*, 3 H. & N. 869.

**Servant of Railroad Company not Competent as Juror.**—A servant or other employee of a railroad company is not competent as a juror in a suit to which the company is a party. His interest is such as was held at common law to constitute a bias of a most dangerous kind. *Frederickton Boom Co. v. McPherson*, 3 Hannay (N. B.) 8; *Hubbard v. Rutledge*, 57 Miss. 7; *Central R. Co. v. Mitchell*, 68 Ga. 173; s. c., 1. Am. & Eng. R. R. Cas. 145.

**When Company Liable Notwithstanding Contributory Negligence.**—When the servants of a railroad company perceive the perilous position in which a person has through contributory negligence placed himself, and notwithstanding, fail to exercise reasonable care to prevent injury to him, but wilfully run over him, the railroad company is liable. For a full list of the authorities on this point see *Citizens' Street Ry. v. Steen*, and note, *infra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO R. Co.

v.

SHANKS.

(94 *Indiana Reports*, 598.)

Plaintiff alleged that the defendant company's servants negligently piled up a truck on the platform so high that it became top-heavy, and being touched by plaintiff, who was passing along the platform, fell upon her, inflicting injuries.

*Held*, that there was no wilful negligence charged, and that therefore plaintiff was bound to show that there was no contributory negligence on her part.

Punitive damages were not recoverable in any event in the above case, no wilful act being shown on the part of defendant or its servants.

From the Monroe Circuit Court.

G. W. Friedley for appellant.

M. F. Dunn, G. G. Dunn, J. R. East and W. H. East for appellee.



**FRANKLIN, C.**—Appellee, by her next friend, sued appellant for injuries received by a truck turning over upon her on the platform at the railroad depot in the city of Mitchell, Indiana.

The suit was commenced in Lawrence County, and the venue was changed to the Monroe Circuit Court, where there was a trial by jury, verdict for plaintiff, and, over a motion for a new trial, judgment was rendered upon the verdict.

The error complained of is in overruling the defendant's motion for a new trial; and the only reasons insisted upon are, that the verdict is not sustained by sufficient evidence, and error in the instructions to the jury.

The complaint charges that in June, 1881, said defendant, by its agents, carelessly and negligently loaded the truck so top-heavy that when touched it was liable to turn over, and placed and left said truck, so loaded, upon the depot platform within a public sidewalk; that the plaintiff, while passing on the platform, touched the truck, when it fell over upon her, and inflicted the injuries complained of.

Without deciding upon the sufficiency of the evidence, we proceed to examine the instructions.

It is insisted by appellant that the court erred in its instructions given to the jury, and in refusing to give instructions asked by the defendant.

The first instruction asked by the plaintiff, given by the court, and excepted to by the defendant, is as follows:

"In this class of cases, ordinarily, the plaintiff must be without fault, but this is not always the case; and in this case, if you should find from the evidence that the defendant improperly and negligently loaded said truck, and it was loaded in such a manner as to be dangerous by reason of said loading, and in allowing their truck, so loaded with boxes, chests and trunks, to remain upon a street or sidewalk or platform where the public had a right to travel, were guilty of gross or wilful negligence in so allowing it to remain so loaded; and should you also find in this case that the plaintiff was guilty of slight negligence only, and you further find that the plaintiff was injured as charged in the complaint, by reason of such gross or wilful negligence on the part of the defendant, such slight negligence on the part of the plaintiff would not defeat this action. And if you find these to be the facts, you should find for the plaintiff."

This instruction is erroneous. There is nothing in the complaint or evidence that justified an instruction upon wilfulness; it was not applicable to the case. Gross negligence is not classed with wilfulness. In this class of cases there are no degrees in negligence, and gross negligence is no more than mere negligence. And when wilfulness is not charged, the plaintiff, in order to recover, must make out a case of unmixed negligence, and that she

was without fault. Contributory negligence on her part, however slight, defeats her right to recover.

The second instruction so given is also complained of in part, which part reads: "And that she was negligently injured by the defendant as charged in the complaint, and you further find said plaintiff was injured, if injured, without any fault of her parents or guardian, you should find for the plaintiff and assess her damages at such sum as will compensate her for the injury sustained, to which you may add punitive damages."

The last clause in this part of the instruction is well objected to. Wilfulness is not charged in the complaint, nor shown by the evidence. For mere negligence, compensatory damages only are allowable, and punitive damages cannot be added. We need not examine the errors complained of in refusing to give instructions asked. For the errors in the instructions given, the judgment must be reversed.

**PER CURIAM.**—It is therefore ordered upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs; and that the cause be remanded to the court below, with instructions to grant a new trial, and for further proceedings.

**General Reference.**—See on the point involved in the principal case *Citizens' Street Railway v. Steen*, and note, *infra*, with authorities there collected.

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## CITIZENS' STREET RAILWAY

v.

STEEN.

(42 *Arkansas Reports*, 321.)

A street car driven very rapidly along the street ran into and injured a horse and buggy at a point where owing to an obstruction on the street it was impossible for the driver of the buggy to turn off the track. *Held*, that notwithstanding the fact that the driver of the buggy may have been negligent, the car company was liable in damages if the car driver failed to stop his car when he perceived the dangerous position of the buggy. He had no right to attempt to drive past it at a high rate of speed.

The measure of damages for an injury from a collision of a street railroad car with a carriage is a fair pecuniary compensation for the injuries sustained by the occupant and his property; but if the injury be also wilful, or wanton, or attended by such gross negligence as manifests a careless disregard

of the consequences to the plaintiff, the jury may add such sum as they think proper under the circumstances, as vindictive or exemplary damages, or as punishment for the wrongful conduct of the driver.

**APPEAL** from Pulaski Circuit Court.

John McClure for appellant.

T. J. Oliphant for appellee.

**EAKIN, J.**—This is an action by appellee against a street railway company in Little Rock, to recover damages for an injury to her person and property, occasioned by a collision between a car of the company and a horse and buggy with which she was driving, upon a street along which the line of railway ran.

The buggy was partially upset against a sand bank, and to some extent injured; the horse was lamed, and the plaintiff herself bruised and hurt.

The jury found for the plaintiff, fixing her damages at \$150. A motion for a new trial was denied, exceptions taken, and an appeal.

The material facts proven for plaintiff are as follows: She was driving down the street with her little son in the buggy. The boy stood up, cried to his mother that the street car was coming, and struck the horse with a whip to increase his speed. He repeated the blow, and the horse went still faster, but not so fast as the coming car. There was a sand pile on the street, with a narrow carriage way between it and the track. When about midway of this, where the buggy could not turn to either side, the collision occurred, with the results above mentioned. The top of the buggy was up, and she did not see the car when her son spoke. She says the car was going at an unusual rate of speed, and the driver did not stop when the accident occurred. The sand pile on the street was so placed that all vehicles on that side were compelled to pass between it and the railway, with only four or five feet of room. There was some proof of actual pecuniary damage to the horse and buggy, including harness, but considerably short of the verdict. She says the buggy was struck by the front part of the car very forcibly. In this she is sustained by the testimony of a spectator, who says further that the driver of the car was coming at an extraordinary rate of speed, and that the driver did not stop, nor attempt to stop it. He thought the brake was broken and that the car would run over the mule on the down grade. The buggy was thirty or forty feet in advance of the car when he first saw it.

For defendant, the car driver testified that plaintiff was driving on the track, and he told her to get off, she whipped up, and he understood her to say "Come ahead," and she drove off the track. He attempted to pass her, but the sand pile crowded her on towards the track, and she ran into the car at the rear end.

The front part of the car had passed the buggy without touching. On this last point he is corroborated by a passenger. He says further, that after the accident the car stopped about two minutes. The car could have been stopped in ten feet. Plaintiff in rebuttal denies that she told the driver to come ahead, or saw him before the collision.

The court on motion of the plaintiff, and against the objections of defendant, instructed the jury:

1. That although they might find the plaintiff to have been to some extent negligent, yet if the defendant did, or by reasonable diligence might have discovered the negligence in time, and by using ordinary care, might have prevented the injury and failed to use such care, it would be responsible.

2. That the company was responsible for the damages to the property or person of plaintiff, by the wrongful act of its servant in running the car against the buggy, if they should find that he did so, unless they should further find that the plaintiff had been guilty of contributory negligence.

In the first instruction asked by the defendant, amongst other things not objectionable, the court was asked to charge that if the plaintiff knew that the street was occupied by the railway track it was her duty, from time to time, to look behind to ascertain if a car was approaching from the rear, and the failure to do so was contributory negligence, which would preclude her recovery.

In the second instruction asked by defendant it was asserted that the duty of carefulness rested both on plaintiff and defendant, and that if both were negligent, and "their conduct was the legitimate result of such negligence," she cannot recover.

The third of defendant's proposed instructions asserted the duty of all persons driving along a street, having upon it a line of street railroad, to keep out of the way of the cars, and if the jury should find that plaintiff negligently or carelessly drove so near to the track of the defendant's line of railroad as to be in danger of collision with its cars, and did not exercise due care in watching the approach of the car, this constitutes contributory negligence on the part of the plaintiff, and before the plaintiff can recover it must be established by a preponderance of testimony that the negligence of the company was the result of a disregard of consequences, or of duty, on the part of the defendant, showing an intent to do an injury.

He asked in his fourth instruction that the court declare "the reasonable speed of a street car to be the average rate of carriages used to convey passengers by horse-power."

"5. If the injury sustained was the product of mutual or concurring negligence, no action would lie."

"6. If the plaintiff contributed to the accident, then she must

establish by preponderating evidence that the injury was inflicted by defendant wilfully and wantonly."

"7. That only actual damages, to be shown by positive proof, could be recovered. The plaintiff would not be entitled to exemplary damages unless the injury was the result of wanton, wilful and intentional wrong."

All these were refused as asked, but the court modified the second to read as follows:

"The mere fact that the defendant was negligent will not entitle the plaintiff to recover, if the plaintiff was also negligent, and that the duty of being careful rests both on the company and the plaintiff; and if the jury find from the evidence that the plaintiff and the defendant were both negligent, and that the negligence of the plaintiff was the proximate cause of the injury, she cannot recover, and they will find for defendant."

The defendant excepted to this modification.

The court further, upon its own motion, charged the jury that no action could be maintained where there had been mutual negligence, and the negligence of each was the proximate cause of the injury.

It explained to them the meaning of proximate cause to be "negligence directly contributory to produce or bring about the injury."

Further, that though some negligence might be shown on the part of plaintiff, yet if the defendant, knowing of that negligence, might, by the exercise of ordinary care and prudence, at the time of the injury, have avoided the same, an action would lie for the plaintiff.

The court proceeded to define ordinary care to be, the use of such watchfulness and precaution as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. "Or," the judge continues, "such care as a reasonably prudent man, under the peculiar circumstances of the case, would exercise." Upon the other hand, negligence was the failure to exercise such care and prudence. The jury were told that it was their peculiar province to settle this question of diligence or negligence in view of all the circumstances surrounding the case, the specific degree of care to be measured by the nature and character of the business, the appliances, and the dangers ordinarily incident thereto. The rule requires, not the utmost possible caution and prudence, but just such degree of it as might reasonably be expected of persons of ordinarily prudent business habits to avoid danger under the circumstances of each case. They were told that if the plaintiff, by her own negligence, contributed to the injury, the company would not be liable unless the injury was wilful, or unless it resulted from the want of ordinary care on

its part to avert it after the negligence of plaintiff had been discovered. They were advised that the company had the right to run its cars at any rate of speed that was convenient to it, and not dangerous to passengers and the public along the track; and other parties had the right to drive along the street and cross and recross the track, using proper care and prudence to keep out of the way of the cars. Other directions to like effect were embodied in the instructions, amplifying and elucidating, without varying what is above set forth.

On the point of damages they were told that they might find as a measure "a fair pecuniary compensation for such injuries as you may find she sustained, to herself and her property; and, in addition to that, if you find the injury was wilful, or attended with such gross negligence as manifests a careless disregard of the consequences to plaintiff, then you may add such sum as you think proper under the circumstances, by way of vindictive or exemplary damages, or as a punishment for the wrongful conduct of the employee of the defendant."

The motion for a new trial questions the sufficiency of the evidence to support a verdict, and the correctness of the rulings of the court in giving, refusing and modifying instructions.

Upon the evidence we have no hesitancy in saying that it may well support a finding that the injury was unnecessary, easily avoidable by ordinary prudence, and the result of conduct wanton and reckless, if not mischievous and wilful. To dash past a buggy in that situation at an unusual rate of speed, the buggy hemmed in a narrow way between a sand bank and the track, containing a woman and child, pressing and eager to get out of the immediate danger, was simply shocking. The jury was entitled to weigh the evidence, and to take this view of it. Street railways are a public convenience. They are to be encouraged and protected in the proper and judicious exercise of their franchises; but they are not entitled to a monopoly of the street, not even to the exclusive use of that part covered by their tracks. They must exercise their rights in fair accordance and harmony with the rights of all citizens and strangers to use the streets for legitimate purposes, with wagons, carriages, buggies, horses, or on foot. Cities, and especially the shopping streets, are necessarily crowded with men, women and children, whose convenience, or necessities, require the use of wheeled vehicles. Amongst the crowds some will, of course, be heedless. There is something revolting in the idea that mere negligence of persons, who must, perforce, be left to take care of themselves or be kept prisoners in houses, will excuse a street railway company in smashing their vehicles and endangering their lives, when the driver might fairly avoid it. It is too great a privilege to entrust to employees.

It is enough if persons guilty of negligence are precluded from



recovering for injuries brought on by their negligence, and which others, aware of the negligence, might not fairly have avoided.

We have rarely met a case in which the instructions, taken all together, gave a more careful, correct and lucid exposition of the law, in a manner adapted to the comprehension of average jurors. The instructions given cover all the points, and are in accordance with the best authorities, if not, indeed, with all. The principles are directly asserted, or plainly assumed, in *St. L., I. M. & S. Ry. Co. v. Hecht*, 38 Ark. 369; *L. R. & Ft. S. Ry. v. Finley*, 37 Ark. 563; *St. L., I. M. & S. Ry. Co. v. Freeman*, 36 Ark., 41; *Evans & Shinn v. Rudy*, 34 Ark. 383. See also, as germane to the principle upon which the damages were measured, *Barlow v. Lowder*, 35 Ark. 494; *Clark et al. v. Bales*, 15 Ark. 452.

The rule, as laid down in the text-books, regarding contributory negligence, and concerning which there is really no conflict, is this, that "the negligence of one party is no reason in itself why he should be punished by the negligent misconduct of another." "In other words, negligent as I may be, if, by due prudence, he could avoid hurting me, he is liable for the hurt his negligence inflicts." "Though I may be a trespasser on his property," says Mr. Wharton, "this does not excuse him in recklessly exploding gunpowder under my feet, or in firing a battery at my head." (*Law of Negligence*, secs. 335 and 344.)

And with regard to exemplary damages, resulting from negligent misconduct, the principle collected from numerous authorities is thus laid down by Mr. Thompson, in his work on Negligence, volume 2, page 1264: "If it was wantonly or wilfully inflicted, or with such gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a reasonable compensation for the injury actually sustained, such a sum in damages as the circumstances justify," and this applies to corporations also. For the negligent misconduct of employees see *Ib.* p. 1265.

Whilst street railway companies must, as we have said, be recognized as useful, and protected in all proper exercise of their right, and discharge of their duties in the public service, and whilst they must be absolved from such damages as occur from accidents occasioned by the negligence of others, which the employees of the company could not, in the exercise of due care, have averted; yet they must be held to such a reasonable regard to the lives and property of citizens, however negligent, as would be prompted by a sense of justice and humanity. They are not authorized to resent and punish carelessness, which gives their employees trouble and inconvenience. Their interests are not paramount to those of citizens who walk, or ride horses, or use other vehicles. There must be mutual care and mutual courtesies in the use of the streets. All cities are

crowded with women and children, who necessarily go unprotected to school, to market, or on errands, or shopping, or visiting. Most of them are naturally heedless. The streets are for them also, and they are not to be unnecessarily jostled, frightened, lamed or treated with indignity, because they get upon the railway tracks, to say nothing of danger of life and limb.

I say unnecessarily, for, if unfortunately their carelessness should result in injury, which the employees of the company could not reasonably foresee or avert, there can be no remedy.

The new trial was properly refused.

Affirmed.

**Cases in which Company is Liable Notwithstanding Contributory Negligence.**—In all negligence cases it is well settled that, notwithstanding contributory negligence on the part of the plaintiff, if the defendant or his servants, after becoming aware of the plaintiff's dangerous position, have failed to exercise reasonable care or prudence to prevent injury to him, the defendant will be held liable. *Trow v. Vermont, etc., R. Co.*, 24 Vt. 487; *Austin v. New Jersey Steamboat Co.*, 48 N. Y. 75; *Haley v. Earle*, 30 N. Y. 208; *Myers v. Chicago, etc., R. Co.*, 59 Mo. 228; *Baltimore, etc., R. Co. v. Trainor*, 38 Md. 542; *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350; *Northern Central R. Co. v. Price*, 29 Md. 420; *Sullivan v. Louisville Bridge Co.*, 9 Bush. 81; *Isbell v. New York, etc., R. Co.*, 27 Conn. 398; *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 475; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Carroll v. Minnesota V. R. Co.*, 13 Minn. 30; *Price v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. R. Cas. 365; *Behrens v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. R. Cas. 222; *Rains v. St. Louis, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 610; *Little Rock, etc., R. Co. v. Parkhurst*, 5 Am. & Eng. R. R. Cas. 635; *Colorado Central R. Co. v. Holmes*, 8 Am. & Eng. R. R. Cas. 410; *Chicago, etc., R. Co. v. Johnson*, 8 Am. & Eng. R. R. Cas. 225; *Swigert v. Hannibal, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 322; *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. R. Cas. 726; *Houston & T. C. R. Co. v. Richards*, 12 Am. & Eng. R. R. Cas. 70; *Terre Haute & Indianapolis R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas. 77; *East Tenn., Va. & Ga. R. R. Co. v. Humphreys, Adm'r.*, 15 Am. & Eng. R. R. Cas. 472.

**Wilful Acts after Discovery of Contributory Negligence.**—In some cases it is said that the company cannot be held liable unless its employees are guilty of wilful conduct, injuring a party after they have become aware of the dangerous position in which he is placed. *Zimmerman v. Hannibal & St. Jo. R. Co.*, 2 Am. & Eng. R. R. Cas. 191; *St. Louis, I. Mt. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. R. Cas. 608; *Terre Haute & Ind. R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas. 77.

## PHILADELPHIA, WILMINGTON AND BALTIMORE R. R. Co.

v.

STEBBING.

(*Advance Case, Maryland. 1884.*)

In an action to recover damages for injuries occasioned by being run over by a railroad train, the plaintiff is bound to show the particular negligence complained of, and to trace the cause of his injury directly to that negligence.



Unless he is a passenger no prima facie presumption of negligence arises from the occurrence of the accident.

When the train causing the accident was running at a higher rate of speed than allowed by ordinance, this does not of itself constitute any proof of negligence unless plaintiff shows that the injury would not have occurred but for the violation of the provision of the ordinance.

If the plaintiff was guilty of contributory negligence in the above case, he was not entitled to recover, even though the speed of the train was in violation of the provisions of the above ordinance.

It is error to instruct a jury that they may presume that a party did that which was necessary to self-preservation, when the facts and circumstances are so proved that the jury are able themselves to pass upon a party's conduct. It is only where there is an absence of evidence to the contrary or where there is a rational doubt upon the evidence as to the acts and conduct of the parties that such presumption can be properly invoked.

APPEAL from the Circuit Court for Cecil County.

William J. Jones and Alexander Evans for appellant.

Albert Constable for appellee.

ALVEY, J.—We think the court below was quite right in refusing to withdraw this case from the jury on the prayers of the defendant. While the testimony as to the material facts of the case was very conflicting, that given on the part of the plaintiff entitled him to have the weight and credibility of the whole evidence passed upon by the jury. For though it be true, if we assume the truth of all the evidence on the part of the defendant, there would be no ground for recovery by the plaintiff, yet the evidence on the part of the plaintiff, if believed by the jury, might well afford ground for the conclusion that there was such negligence on the part of the defendant as to entitle the plaintiff to recover. Whether the employees of the defendant in charge of the train ran the train at a greater rate of speed than that allowed by the ordinance of the town of Port Deposit, or whether they rang the bell to give warning of the approach of the train, are facts in regard to which the testimony is in direct conflict. They did not sound the whistle, and they were running the engine and tender backwards, in which position the air brakes were powerless over the train. Both engineer and fireman prove that they saw the plaintiff and his fellow-laborer at work in near proximity to the railroad tracks at considerable distance before reaching the spot, and that being so it was their duty to avoid running upon them without giving signal or warning of approach. But both the engineer and fireman say that the train was slowed up, and was not running, at the time of the accident, at a rate of speed exceeding from four to six miles an hour, and that the bell was continuously rung, after leaving what is known as the Bank Station, until the train reached the point of the accident. If this be so, clearly there could be no fault or negligence imputed to the defendant; but the direct and proximate cause of the accident would be imputable to the negligence of the

plaintiff in putting himself in a place of possible danger, and in not looking out for the approach of the train.

We do not, however, intend to intimate any opinion as to the proper conclusion to be drawn from the conflicting evidence, but leave that to be done by the jury, to whom the consideration of the facts belongs.

In all these cases where negligence is the ground of action, and the plaintiff was not a passenger of the defendant at the time of the injury received, the onus of proof is upon the plaintiff to trace the cause of his injury directly to the fault or neglect of the defendant, and to do this he must show the circumstances under which the injury was received. And if from the circumstances thus shown it appears that the fault was mutual and concurrent, and the plaintiff is justly liable to have fairly imputed to him direct contributory negligence in the production of the accident, he shows himself to be disentitled to recover. *Frech v. P., W. & B. R. R. Co.*, 39 Md. 574; *Cooley on Torts*, 673.

The principle laid down by an eminent English judge, and which was approved by the Court in Exchequer Chamber and by the House of Lords (*Daniel v. Metropolitan Railway Co.*, L. R. 3 C. P. 591; *Ibid.* 5 H. L. 45), is clearly a correct one, and that is that it is not enough for the plaintiff to show that he has been injured by an accident upon the defendant's road, and thence to argue that the defendant is liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to; and further, that the plaintiff should also show with reasonable certainty what particular precautions should have been taken to avoid the accident. Here, according to the contention of the plaintiff, the accident resulted from the unauthorized rate of speed with which the train was run through the town, and the neglect to give signals of the approach of the train. These facts are material, and in regard to which, as we have seen, the evidence is conflicting, making a question appropriate for the jury.

In regard to the first prayer, granted at the instance of the plaintiff, as the statement of a general proposition, it is unexceptionable. It is very general in its terms, it is true, and did not impart much instruction to the jury as to the value and legal bearing of any particular fact in proof. But the general legal proposition thereby formulated is free from error, however much it may be wanting in specific reference to the facts of the case.

But with respect to the third prayer of the plaintiff, which was granted, we think there was error. It was well calculated to mislead the jury. It declares that under the town ordinance it was negligence *per se* for the defendant to run its cars through the town

at any rate of speed exceeding ten miles an hour; and if it did run its cars at any greater rate of speed, however small the excess, "the defendant was bound to use the highest possible degree of care and caution which it had the means and power to employ, having regard to the business it which it was engaged."

With respect to the two branches, or rather propositions, embraced in this instruction, it may be observed that if the running the train through the town at any rate of speed in excess of ten miles per hour be negligence per se, it would not have been easy for the defendant to escape the consequences of that negligence by the exercise of the degree of care required by the latter branch of the instruction, unless indeed it be shown that the negligent act of the defendant in violating the ordinance did not contribute to the production of the injury at all. The inconsistency aside, however, the instruction is objectionable in other respects.

There is no question made of the municipal authority to pass the ordinance, and it simply provides "that no locomotive shall be propelled within the limits of Port Deposit at a greater rate of speed than ten miles per hour, and that any engineer or other person violating this ordinance shall be fined ten dollars for each and every offence."

This ordinance is general, and is for the protection of the public generally; but the neglect or disregard of the general duty thereby imposed for the protection of every one can never become the foundation of a mere personal right of action until the individual complaining is shown to have been placed in position that gave him particular occasion and right to insist upon the performance of the duty to himself personally. The duty being due to the public, composed of individual persons, each person specially required by the breach of duty thus imposed becomes entitled to compensation for such injury. But he must have been in position to entitle him to the protection that the ordinance was designed to afford, and he must show how and under what circumstances the duty arose to him personally, and how it was violated by the negligence of the defendant to his injury. In other words, it must appear that the negligent breach of the duty imposed by the ordinance was the direct and proximate cause of the injury complained of, and that such injury would not have occurred but for the violation of that duty. *Hayes v. Mich. Central R. R. Co.*, 111 U. S. 228, 240, 241; s. c., 15 Am. & Eng. R. R. Cas. 394; *Penn. R. R. Co. v. Hensil*, 10 Ind. 569; *Cooley on Torts*, 657-8.

Now this third prayer of the plaintiff is a mere abstraction, and therefore well calculated to mislead. It does not require the jury to find any causal connection between the negligent act in running the train in violation of the ordinance and the injury complained of. If the defendant's train was in fact run through the town at a greater rate of speed than that allowed by the ordinance, it may be

conceded that such running was of itself negligence and a violation of the ordinance, for which the engineer would incur liability for the penalty prescribed. But while that may be so, it would be quite immaterial to the case of the plaintiff, unless it be shown that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself. If he knew of the near approach of the train in time to get out of the way of danger, and failed to do so, he could have no right of action, though the train was run at a rate of speed greater than that allowed by the ordinance. In such case, the fact that the train was run at an unauthorized rate of speed would in no way relieve him of the consequences of his own negligence and afford him a right of action against the defendant.

In the abstract form in which the instruction was given, and from the terms employed, the jury may have inferred that the defendant was liable merely because of the fact that the train was run at a forbidden speed, and that such liability was wholly irrespective of any contributory negligence on the part of the plaintiff. For the reasons assigned we think there was error in granting the third prayer of the plaintiff.

With respect to the fourth prayer of the plaintiff, which was granted, in view of the facts of the case we think it ought to have been refused, or if granted at all it ought to have been in a modified form to avoid the possibility of misleading the jury.

It is certainly true the motive to self-preservation is a principle of our common nature, and it is but natural to presume, in the absence of evidence to the contrary, that parties act under its promptings in view of impending danger. But in such cases as the present there is a counter-presumption when the proof does not show to the contrary—and that is, that every person charged with a duty involving the safety of himself or others will perform that duty; so that in fact it is not often the case that these mere presumptions afford much assistance in arriving at correct or just conclusions. They ought not to be indulged to the exclusion of direct evidence to the contrary; and it is only where there is no reliable proof to the contrary, or there is rational doubt upon the evidence as to the acts or conduct of the parties, that such presumption can properly be invoked. The jury ought not to be instructed in such terms as would justify them in acting upon the mere presumption of the absence of fault in either party, in disregard of the proof in the case, where there are facts and circumstances to be considered by them.

The form of the instruction in this case is the same as that used in several cases that have come before the court, and where the instruction has been sanctioned; but the propriety of such instruction must always be determined with reference to the nature and state of the proof before the jury. It will not do to instruct them that it is

competent to them, in connection with the facts and circumstances of the case, irrespective of the nature and force of such facts and circumstances, to infer the absence of fault on the part of either plaintiff or defendant, from the known general disposition of men to avoid danger. Such an instruction in many cases would be exceedingly misleading, and we think it was error to give it in this case in the form in which it was given.

It follows that the judgment below must be reversed and a new trial awarded.

**Driving Train at Greater Speed than Permitted by Ordinance ordinarily Amounts to Gross Negligence.**—Ordinarily when a train is driven at a higher rate of speed than is permitted by ordinance, the negligence of the company is deemed gross. *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524; *Karle v. Kansas, etc., R. Co.*, 55 Mo. 476; *Chicago, etc., R. Co. v. Becker*, 84 Ill. 483; *St. Louis, etc., R. Co., v. Dunn*, 78 Ill. 197; *Shaber v. St. P., M. & M. R. Co.* 2 Am. & Eng. R. R. Cas. 185; *Faber v. St. Paul, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 277.

But see *Hanlon v. South Boston R. R. Co.*, 2 Am. & Eng. R. R. Cas. 18.

**Failure to Observe Statutory Precautions only Creates Liability when it Causes Injury.**—A railroad company neglecting a statutory precaution is never held liable unless it appears that the neglect complained of actually caused the injury. *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358; *Baxter v. Troy, etc., R. Co.*, 41 N. Y. 502; *Nicholson v. Erie, etc., R. Co.*, 41 N. Y. 525; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Gaston v. Erie R. Co.*, 45 N. Y. 660; *Calligan v. New York, etc., R. Co.*, 59 N. Y. 651; *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119; *Chicago, etc., R. Co. v. Notzki*, 66 Ill. 455; *Peoria, etc., R. Co. v. Siltman*, 67 Ill. 72; *Commonwealth v. Fitchburg R. Co.*, 120 Mass. 372; *Illinois, etc., R. Co., v. Benton*, 69 Ill. 174; *Chicago, etc., R. Co., v. Van Patten*, 74 Ill. 91; *Fletcher v. Atlantic & Pac. R. Co.*, 64 Mo. 484; *Kelly v. Union Ry. & Transit Co.*, 11 Mo., App. 1; *Kelley v. Hannibal & St. Jo R. Co.*, 75 Mo. 138; s. c., 13 Am. & Eng. R. R. Cas. 638.

But see *Commonwealth v. Fitchburg R. Co.*, 10 Allen, 189; *Correll v. Burlington, etc., R. Co.*, 38 Iowa, 120; *Kennayde v. Pacific R. Co.*, 45 Mo. 255; *Madison, etc., R. Co. v. Taffe*, 37 Ind. 361; *Beaver v. Delaware, etc., R. Co.* 30 Pa. St. 454; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60; *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

**Trespassers on Track.**—When a party either actually trespasses upon the track of a railroad company or places himself so close to it as to incur the risk of injury from passing trains, he is guilty of contributory negligence and cannot recover, even if the railroad company has been guilty of negligence. *Bancroft v. Boston, etc., R. Co.*, 11 Allen, 34; s. c., 97 Mass. 275; *Rome v. Milwaukee, etc., R. Co.*, 21 Wisc. 256; *Poole v. North Carolina R. Co.*, 8 Jones L. 340; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Carlin v. Chicago, etc., R. Co.*, 37 Iowa, 316; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; *Lake Shore, etc., R. Co. v. Hart*, 37 Ill. 529; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 298; *Michigan, etc., R. Co. v. Campau*, 34 Mich. 468; *International & St. N. R. Co. v. Jordan*, 10 Am. & Eng. R. R. Cas. 301; *Bacon et al. v. Baltimore & P. R. Co.*, 15 Am. & Eng. R. R. Cas. 409; *Carter v. Columbia & S. C. R. Co.*, 15 Am. & Eng. R. R. Cas. 414.

**Presumption that Party has Exercised Care.**—It has been held proper and allowable under certain circumstances to instruct the jury that they may infer absence of contributory negligence on the part of a person deceased, from the general and well-known disposition of mankind to take care of them-

selves and keep out of danger. *Northern Central R. Co. v. Geis*, 31 Md. 357; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Cleveland P. R. Co. v. Rowan et ux.*, 66 Pa. St. 398; *Gay v. Winter*, 84 Cal. 158; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 391.

See, contra, *Chase v. Maine Central R. Co.*, *infra*.

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CENTRAL R. R. OF GEORGIA

v.

BRINSON, by next friend.

(10 *Georgia Reports*, 207.)

The plaintiff, a boy over fifteen years of age, with others, had been in the habit of walking along the railroad track in going to and from school, it being a better walk than the dirt road near by. He had been accustomed to remain on the track until the cars came near to him, and a short time before the accident had twice received the complaints of one of the employees of the road, for waiting too long in getting from the track. He knew about what time the train might be expected. On the day of the accident, he and a girl, smaller than himself, were walking on the track; the approaching train could be seen more than a quarter of a mile distant; he remained on the track until it came very near him; he then stepped off on one side upon a pathway running beside the track; his distance from the track was estimated differently, but was small; he could have gone further, the bank being sloping and not high; he stood till a large part of the train had gone by, and was looking at the wheels, when he was struck (as he claimed) by a piece of plank projecting from a flat car, was knocked down, and run over.

*Held*, that he was bound to be watchful and careful, and the absence thereof makes him chargeable with negligence, which will prevent a recovery. His conduct in this case would, perhaps, not have been short of culpable negligence even in one who was rightfully on the track; and it might and could have been easily avoided.

One who walks upon the track of a railroad, not at a road crossing, is a trespasser thereon, and while the road would be liable for a wanton or wilful wrong of its agents, acting within the scope of their duty; or for gross negligence or carelessness, evincing reckless disregard of the safety of others; or where they perceive the danger of a party in time, and make no effort to avoid it,—still the company is under no such obligation to a trespasser as to those who are properly and lawfully upon its premises, either for the purpose of transacting legitimate business with it, or in furtherance of rights reserved to them by law.

The mere fact that people have frequently trespassed upon a railroad track and that the company may not have resorted to any means to stop the same will not imply consent to such use of the track; nor will it create any right in the public by such user.

In charging on the subject of contributory negligence, it was error in the court to charge as follows: "A railroad company is bound to use ordinary care in the running of its trains, to prevent them from coming in collision with the person of another; and this it is bound to use, even if that other is, on his side, in some degree negligent; therefore, if damage happen to such other person by a collision which the company, by the use of ordinary care,



might have prevented, the company must make good the damage." Such a charge left the jury to infer that they were at liberty to find the entire amount of the damage done to the plaintiff, without making any abatement for the negligence chargeable to him.

JEFFERSON BRINSON, a minor, represented by his father and next friend, James Brinson, brought his action for damages against the Central R. R. His declaration alleged that in February, 1877, the Central R. R., being the lessee of the Augusta & Savannah R. R., and operating it, had so carelessly and negligently loaded and run its engine and cars in the county of Burke that they ran over and crushed the foot and ankle of plaintiff, causing him to lose the same and otherwise injuring him. Damages were laid at \$20,000. Defendant pleaded the general issue.

On the trial, the evidence for the plaintiff showed, in brief, the following facts:

Plaintiff was a boy fifteen years of age, living in the town of Lawtonville, Burke County. He attended school on the opposite side of the town from that where he lived, and about three miles distant from his home. He frequently walked to school, and in doing this he was accustomed to walk along the track of the A. & S. R. R., which was leased and operated by the C. R. R. There was a dirt road running along the line of defendant's right of way, but it was not suitable for the use of foot-passengers, and in winter was muddy and almost impassable. Near the school-house there was a culvert under the railroad, which had become partly stopped up, causing a pool of water to collect and rendering the road unsuitable for walking. It was the common custom of persons passing through Lawtonville on foot to walk along the railroad track. Not far from the school-house the railroad was elevated above the ordinary level of the ground, and ran along an embankment about six feet in height. On the morning of February 7, 1877, plaintiff, in company with a girl who was attending the same school, was walking along the track towards the school-house. When within about two or three hundred yards of his destination, and midway between a switch and the point where the wagon road crossed the railroad, being about twenty yards from each, he saw a wood train approaching him. It was about two or three hundred yards distant. The track was straight for about a mile, and there was nothing to prevent seeing the train. When the train had arrived within from twenty-five to forty yards of plaintiff, he stepped off the track on to the embankment, as did also his companion. At this point the embankment was about four or five feet wide outside of the track. Plaintiff moved some three feet from the track to allow the train to pass. His companion was a little in front of him and slightly further from the track. She was also not so tall as he. The train was composed of four or five box cars and several open flat cars, the box cars being next to

the engine, the flat cars following, and the conductor's cab being last. There was nothing to prevent the conductor from seeing the entire train. It was running at a very rapid speed; more rapidly than usual. The rate was estimated at from twenty to thirty miles per hour. The engine and box cars passed plaintiff without injury to him. Plaintiff was watching the passing cars when a flat car near the middle of the train approached him, and he noticed a piece of plank or timber projecting from it. He at once dodged, and endeavored to escape the blow which he saw was imminent, but it was impossible to do so, and the plank struck him on the head, knocking him down, and his right foot and ankle were crushed. The plank which caused the injury was about nine or ten inches wide, two or two and a half inches thick, and eighteen or twenty feet long. It projected six or eight feet beyond the side of the car. After striking plaintiff, it struck the upright iron switch a short distance beyond him with such force as to bend it over. This switch was situated from four to six feet from the track, and by the force of the collision between it and the plank the latter was knocked from the train and stuck in the ground. An indentation was found in the plank, variously estimated to be from three to six feet from the end of it. When the train passed Perkins' Junction, about two and a quarter miles from Lawtonville, before the accident happened, the plank was seen to be projecting three to five feet from the car, by two or three witnesses. One of the parties who saw it motioned to some one on the train and halloed, but nothing was done in regard to it. No whistle was blown or signal given before the accident occurred. Plaintiff could have left the embankment entirely before the train reached him, but moved to a distance which he considered safe, and where the train, ordinarily loaded, would have passed him without injury. The wagon road which crossed the railroad was one in common use, and had a plank crossing over the railroad track kept in repair by the railroad, but there was no sign-board at such crossing. There was a signal-post about three hundred yards beyond the point where the accident occurred. By reason of the injury, plaintiff was confined to his bed for a number of weeks; was compelled to have his leg amputated, suffering great pain from it; his health was impaired, and he was rendered permanently unfit for any active business which would require walking or standing.

The evidence for the defendant was, in brief, as follows:

The train in connection with which the accident occurred was a wood train going from Augusta to a point above Millen for wood. It was composed of three box-cars next to the engine, twelve empty flat cars, and the cab. It was not the habit of wood trains to stop at Lawtonville unless there were cars to be left there, which was not the case that morning. It was a dark and foggy morning, and the conductor could not see the piece of timber from the



cab, it being ten cars distant from him, and the standards being up in the ends of the flat cars. He kept the usual lookout, and observed the usual precautions. The average speed, according to schedule for that train, was from fifteen to eighteen miles per hour. On account of the darkness of the morning, and foggy state of the weather, the train was running a little slower than usual. There was a light down grade at the point where the accident occurred, extending about three quarters of a mile. As the train neared the school-house, the engineer saw some children on the track, and opened the cylinder cock for the purpose of letting off steam and scaring them off. He also saw the plaintiff and the young lady with whom he was, just above the switch on the track. They stepped from the track, the engine passed them, and the engineer knew nothing of the accident until some time afterwards. When they stepped from the track the girl or young lady was farthest from the train. The plaintiff was very close to the cars, being within a foot or a foot and a half of them. The iron stirrups into which standards are inserted on flat cars project about five inches from the side of the cars and to or beyond the ends of the cross-ties. Two or three of the persons on the train noticed that plaintiff was very close to the track, and one of them remarked upon it. The conductor saw plaintiff very close to the cars, saw him fall, did not know the cause of it, but thought that he had been struck by one of the standards. Plaintiff got up almost immediately upon falling, and the conductor did not think that he was injured. The right of way of the railroad is one hundred and fifty feet in width and belongs to the company. The railroad was built before the village of Lawtonville was in existence. Sometimes freight projects beyond the side of the cars, and sometimes wood projects a foot or two. On one occasion a large wheel was carried over this track which projected two or three feet beyond the edges of the car. On two previous occasions, while walking on the track, plaintiff had delayed in getting off until the train was very close to him, so as to cause complaint from the section-master, and on one occasion compelling him to slacken the speed of the train. The conductor saw a man motioning to him at Perkins' Station, but as the same person had previously spoken to him about obtaining some cars, he thought the sign had reference to that. On a previous trial of this case, plaintiff swore that he was looking to the side of the car passing, and happening to turn his head, saw the piece of timber projecting from the open car.

The jury found for the plaintiff \$11,500. Defendant moved for a new trial on the following grounds :

(1) Because the verdict is contrary to the following charge of the court: "The plaintiff is bound to make out his own entire case by testimony, so far as regards himself and defendant. If he fails to do so in any particular, he cannot recover."

(2) Because the verdict is contrary to the following charge of the court: "If the railroad company, or its employees, were negligent at the time of this accident, yet if that negligence did not cause or contribute to the injury of this plaintiff, he cannot recover on that ground."

(3) Because the verdict is contrary to the following charge of the court: "If the engineer failed to blow the whistle or ring the bell, and even thus violate the statute, yet if Brinson, plaintiff, had all the notice of the approach of the train, by actually seeing it, which he would have had by the whistle or the bell, then he cannot recover on that ground."

(4) Because the verdict of the jury is contrary to the following charge of the court: "Even though the officers and agents of the railroad company were guilty of negligence on that occasion, yet if Brinson, by the exercise of ordinary care and diligence, could have avoided the consequences to himself of that negligence, he cannot recover."

(5) Because the verdict is contrary to the following charge of the court: "And where the evidence shows that plaintiff failed to use this care and diligence to avoid the consequences to himself, it is not a case of contributory negligence, but plaintiff cannot recover at all."

(6.) Because the verdict is contrary to the following charge of the court: "A traveller who selects the track of a railroad on which to walk, does so at his peril, and is bound to make vigilant use of his senses of sight and hearing to avoid collision, and if he neglects to do so and is injured thereby, he cannot recover, even though the railroad company is chargeable with negligence."

(7) Because the verdict is contrary to the following charge of the court: "Even though the train was running at a greater speed than was proper, yet if the plaintiff could have avoided the consequences resulting therefrom by the use of ordinary care and diligence on his part, he cannot recover."

(8) Because the verdict is contrary to the following charge of the court: "It is not the duty of a railroad company, under the statutes of this State, to blow the whistle when its trains are passing through an incorporated town."

(9) Because the verdict is contrary to law, in that it is excessive and not warranted by the law and testimony in this case.

(10) Because the verdict is contrary to law, evidence, and against the weight of the evidence.

(11) Because the court committed error in giving the following charge to the jury in writing, at the request of plaintiff's counsel, without qualification thereto: "A railroad company is bound to use ordinary care in the running of its trains, to prevent them from coming in collision with the person of another, and this it is bound to use, even if that other is, on his side, in some degree negligent ;

therefore if damage happen to such other person by collision, which the company by the use of ordinary care might have prevented, the company must make good the damage."

The motion was overruled, and defendant excepted.

This case has been tried three times. On the first trial, the jury found for the plaintiff \$10,000. A new trial was granted by the Supreme Court (see 64 Ga. 475). On the second trial, the jury found for the plaintiff \$12,500; and on the present trial, \$11,500.

A. R. Lawton, J. J. Jones, for plaintiff in error.

A. M. Rogers, E. L. Brinson, Gibson & Brandt, L. E. Bleckley, for defendant.

HALL, J.—What rights and powers have railroad companies over the tracks and road-beds upon which their trains are run; and growing out of these rights, what duties do they owe to the public; and especially, what are their obligations to look to the safety and protection of persons using their tracks and the embankments upon which they rest, without their express license, for purposes other than those connected with the business they were created and authorized to transact? These are the questions made by this record, and which both parties have urgently and earnestly invoked us to decide. We have held them over for a considerable length of time, that we might give them such consideration and investigation as their importance to these corporations and the community at large demands.

1. While it may be impracticable, if not impossible, to lay down any general rule which will cover every conceivable violation of right or breach of duty that may arise from the negligence of each of the contending parties, yet there are certain fundamental principles, as clear as axiomatic truths, that stand in no need of argument or illustration, to secure their recognition or to enforce their application, which directly relate to the issues with which we have now to deal. Among these is the well-established rule that such corporations, for the benefits and privileges conferred upon them, owe important duties to the public which they are strictly enjoined to perform, and to enable them to perform such duties they are entitled to the unobstructed use of all the means which the law places at their disposal for that purpose. In *Cauley v. The Pittsburg, Cincinnati & St. Louis Ry. Co.*, 95 Pa. St. R. 398—*s. c.*, 4 Am. & Eng. R. R. Cas, 533—the supreme court of that State upon these questions thus declares the law: "It was said by Mr. Justice Strong in *Philadelphia & Reading R. R. Co. v. Hummell*, 8 Wright, 278: 'It is time it should be understood in this State, that the use of a railroad track, cutting or embankment is exclusive of the public everywhere, except where a way crosses it.' The same doctrine has been reiterated again and again in subsequent cases. In *Mulherrin v. Delaware, Lackawanna & Western*

R. R. Co., 31 P. F. Smith, 366, it was said, except at crossings, where the public have a right of way, the man who steps his foot upon a railroad track, does so at his peril. The company has not only a right of way, but it is exclusive at all times and for all purposes;" and *Railroad v. Norton*, 12 Harris, 465, was cited in support of this rule. Many other cases might be referred to, were it necessary. We live in an age of steam and of rapid development. The world demands quick transportation. Increased speed necessarily involves increased danger. Holding, as we do, such corporations to a strict responsibility for negligence, it is our duty to give them a clear track. This rule is not only proper in itself, but is necessary for the preservation of life. Its propriety is no longer a subject for discussion."

2. So far as this decision is confined to the right of the railroad company to the exclusive use of its tracks, cuts and embankments, and to its liability for a failure or refusal to perform its duties strictly, it meets our approval; but we cannot go to the extent of freeing the company from all responsibility for any damage that its agents may recklessly or wantonly inflict upon a person trespassing upon its property. The extent to which this rule is impliedly laid down here is subject to important modifications. In *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. R. 500, it is held that "the right of way of a railroad company is its exclusive property, upon which no unauthorized person has a right to be, for any purpose, and any person who travels upon the right of way of a railroad company, for his own convenience, as a footway, and not for any purpose of business connected with the railroad, is a wrong-doer and a trespasser;" and if he is injured by a passing train, under these circumstances, "the company, can only be held liable for wanton or wilful injury, or such gross negligence as evinces wilfulness." Conceding this principle as to the right of the company to the exclusive use of its track, etc., except at crossings, it does not follow that, because a person thus wrongfully using this right of way is a trespasser and a wrong-doer, he thereby becomes "altogether an outlaw," to whom the company owes no duty whatever. At the common law, in case of gross negligence or carelessness on the part of those in charge of the train, they are held liable for an injury inflicted even upon a trespasser. 6 Am. & Eng. R. R. Cas. 1-17, and note to last page, which collects and classifies many of the American cases upon this subject, as well as upon the liability of the company, where the injury appears to be a mere wanton or malicious act upon the part of an employee, "acting at the time within the scope of his duty."

3. While the foregoing rule as to the amount and character of negligence which is required to render the company liable for an injury to a trespasser upon its road is upheld by a great preponderance of common-law authorities, both in England and America, yet

there are not wanting cases, especially in this country, which apparently hold it to the observance of much more diligence and caution in the prevention of such casualties than is here demanded. "These cases," says the annotator of 6 Am. & Eng. R. R. Cas. ut sup., "seem to indicate that ordinary care will be exacted, and that, in the absence of such care, the company will be held liable." This is a guarded statement. It is not asserted positively that this rule is laid down in any of the cases, but that they seem to indicate it. One of the cases relied on for this indication of the rule is the *Illinois Central R. R. v. Godfrey*, which, as we have seen, attaches this liability "to wanton or wilful injury, or such gross negligence as evinces wilfulness." It is true that the court, after announcing this rule, does go on to say, "if the defendant's servants who were in the management of the engine, after becoming aware of the plaintiff's danger, failed to use ordinary care to avoid injuring him, the defendant might be liable; and this, as we conceive, is the only measure of liability, under the facts of this case," etc.

This, we apprehend, is the extent to which the other cases cited in the note have gone. Certain it is that our own court has gone no farther, for in the case of *Baston v. The Georgia R. R. Co.*, 60 Ga. 340, Jackson, J., delivering the opinion of the court, says: "Even a trespasser upon the track of a railroad is entitled to be protected from gross negligence. Human life is sacred, and if a human form appear upon the road, walking, or sitting, or lying down, some effort should be made to save life." There is here nothing inconsistent, in this additional specification, with the rule for fixing liability laid down in the case, for if the engineer, after perceiving the plaintiff's danger, had failed to use every exertion to avoid injuring him, then it is quite clear to us that his failure, if it did not amount to wanton and wilful wrong, was such gross negligence as was tantamount to wilfulness. Indeed, it would have been criminal, and, according to our Code, would have rendered him liable to prosecution for an offence against the State. Code, § 4586 (b).

The view here presented accords, with one important qualification, with the several provisions of our own Code upon the subject, especially sections 2972 and 3034, which embody the principles of the common law as declared by the decisions of this court, rendered previous to its adoption, and which, so far as we can understand, have been followed in all subsequent decisions, including the case now under examination.

The first of the above sections will be found in Ch. II., Tit. VIII., of the Code. The subject of this title is, "Torts, or injuries to persons or property." Chapter II., under which this section is found, treats of "Injuries to the Person," while the remaining section is to be found under Ch. III., Art. III., of the same title, which



treats of "Injuries by Railroad Companies." By section 2972 it is provided: "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases (i.e., in cases other than those in which, by ordinary care, he could have avoided the consequences, etc.) the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained," while section 3034 enacts that "no person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

Both branches of the rule of liability, as laid down in these sections of the Code, are traceable to, and derived from, decisions of this court, made prior to the adoption of that body of laws. As to the first branch of the rule, see, among other cases, *M. & W. R. R. Co. v. Davis*, 18 Ga. 684; *Central R. R. Co. v. Davis*, 19 Ib. 437; and as to the second, relating to contributory negligence, *M. & W. R. R. Co. v. Davis*, 27 Ib. 113, and *Yonge v. Kinney*, 28 Ib. 111. In *M. & W. R. R. Co. v. Johnson*, 38 Ib. 431 and 432, this court recognized the view here presented as to the origin and source of the law as embodied in these sections of the Code. Subsequent decisions have not deviated from this line, as to liability for negligence. In *Vickers v. The Atlanta and West Point R. R.*, 64 Ga. 308, Bleckley, J., said: "Whether it" (the presumption which, under Code, § 3033, imputes negligence to the company, upon the proof of the injury, and requires upon the part of its agents the exercise of "all ordinary and reasonable care and diligence") "is overcome or not, if the plaintiff either caused the injury by his own negligence, or could, by ordinary care, have avoided it, the verdict should still be for the company." In a case where the injury was to personal property, the same learned judge (in *Geo. R. R. & Bkg. Co. v. Neely*, 56 Ga. 543), after citing Code, §§ 3033, 3034, used this language: "If the plaintiff consented to the injury, the matter is plain. If his own negligence was the sole and only cause of it, there is still no difficulty; for the establishment of that affirmative either negatives the fact of negligence on the part of the company's agents, or renders the fact immaterial. Of course, however negligent these agents may have been, if the plaintiff's negligence was the sole cause of the injury, their negligence was no part of the cause; hence, its immateriality." And in a subsequent part of the same opinion, comparing these sections of the Code with § 2972, and considering how far that is applicable to other injuries than those to the person, he says, p. 544, of this latter section: "It applies, in terms, to personal injuries, and if its meaning can be ex-

tended to injuries affecting property, it would seem to be applicable only where the plaintiff's duty is to act after the defendant's negligence has commenced and become apparent. When the consequences of a present or antecedent negligence are impending, whoever can shun them by ordinary care and fails to do so ought not, perhaps, to be heard to complain of them, whether they touch his person or his property." In *M. & W. R. R. Co. v. Johnson*, 38 Ga. 431, McCay, J., speaking for the court, applies the rule denying a right of recovery to the plaintiff, if, by ordinary care, he could have avoided the injury to himself caused by the defendant's negligence, to railroads as well as to natural persons, and characterizes it as a wise as well as a just rule. He adds, that "the man who neglects ordinary care to avoid an injury has no just right to seek redress, if that injury is produced by the negligence of another, and we see nothing in the character of a railroad company which should subject it to damages for an injury caused by the neglect of its agents, where the person injured might, by the exercise of ordinary care, have avoided the consequences to himself."

In the present case, the question here made is *res adjudicata*, and is not open to review. 64 Ga. 475. It is there stated that the company may relieve itself of damages by showing that its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; or it may show that the damage was caused by plaintiff's own negligence; or it may further show that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence.

It must be further borne in mind that, by Code, § 3033, the presumption of negligence is, in all cases (except suits brought by employees, Code, 3036), against the company, where it is shown that the damage complained of has been done "by any person in the employment and service of the company." This rule (omitting the foregoing exception), like the others, is taken from the common law, as might be shown by a reference to the numerous text writers and cases on the subject. In *N. J. Ex. Co. v. Nichols*, 33 N. J. R. 439, the supreme court of that State held "that the plaintiff was not, as a condition precedent to maintain his action, bound to prove affirmatively that the injury was contributed to by his own negligence, under the penalty of a nonsuit." If, however, the plaintiff's own testimony shows that the damage was caused by his own negligence, or that, by the exercise of ordinary care, he could have avoided it, the defendant, in order to defeat a recovery, would not be bound to make these facts more apparent by the production of additional testimony. Tested by these rules, is this a case in which a recovery was proper?

The plaintiff was not an infant of tender years at the time of this casualty. He was over fifteen years of age, fully capable of perceiving and appreciating the perils of the situation in which he

placed himself; he was in a place where he had no business to be; the place was at all times dangerous, and under the circumstances of this transaction, peculiarly so. He was there for his own pleasure and convenience, not for any purpose of business with the company or its agents. He was not there either by the express license or encouragement of the defendant or any of its agents. He saw the train more than a quarter of a mile off, approaching at a rapid speed; he leisurely pursued his walk, meeting it, and remained on the track until it came very near him, when he got off upon the narrow path that runs by the side of the superstructure on which the rails were placed. This path was not more than four or five feet wide, perhaps not so wide. Another person, Rosa Silverburg, occupied a portion of it, and the plaintiff was standing between her and the train; there was no obstacle to prevent these parties, when they left the track, from getting farther from the passing train; the embankment, at the spot, was neither high nor steep; it sloped gradually, and could have been descended without inconvenience or risk; the plaintiff stood in the path where he first got upon it, until a considerable portion of the train passed him; he had ample time to have gone farther. These are the unquestioned facts, as shown from his own evidence. To them should be added the further fact, as appears from the defendant's testimony, and which was not contradicted or explained, although if it had been possible to do so, there was ample opportunity afforded, that plaintiff had, before this occurrence, been in the habit of remaining on the track, while trains were running, until they got very near him; that, on one occasion, the section-master, while using a pole car, overtook him, and he stayed on the track until the car got very close to him, and the section-master "complained of his being in the way; did not exactly stop the car to get him out of the way, but had to slacken speed; complained to him twice, though he had only to slacken speed once; saw him on the track several times." The plaintiff was well aware that these cars passed the place at or about the time when this accident occurred. Now, upon every principle of law applicable to the subject, this conduct was perhaps nothing short of culpable negligence, even in one who was rightfully on the track, and it might and could have been easily avoided.

In such a position, the plaintiff should have been watchful and careful, and a want of this watchfulness and care makes him chargeable with negligence. "Slight circumstances may overbalance the presumption of freedom from negligence which we suppose to exist in favor of a plaintiff. Thus, his being found in a position of danger unexplained, or his free use of intoxicating liquors," etc., "or any evidence tending to show careless habits, should turn the scale." *Shear. & Redf. Neg. § 45.* "The rule of diligence," says Lumpkin, J., in *Macon & W. R. R. Co. v. Davis*, 18 Ga. 685, "will vary with the ever-changing facts which accom-



pany and surround each given case; the true test, always to be applied, being, did the defendants use reasonable diligence; that is, the care and diligence which, taking into consideration all the circumstances of the case, the exigency required and admitted of?" "Ordinary care, however, as the phrase is here used, implies the use of such watchfulness and precautions as are fairly proportioned to the danger to be avoided, judged by the standard of common prudence and experience. If the danger is remote or slight, the care required to avoid it may be slight; if the danger is near and extraordinary, extraordinary vigilance should be used to avoid it; because such would be the course of a prudent man." *Shear. & Redf. Neg.*, § 30. "The probability of danger" is always "to be taken in view in determining, not merely the grade, but the existence of negligence." *Wharton Neg.*, § 47.

It would be a mere superfluous task to cite further authorities to a principle so fundamental in its nature, and one which the common-sense and experience of mankind will readily recognize and appreciate.

Parties have an undoubted right to the use of public crossings over railways, but before going on these crossings, they should exercise caution and look out for danger; and, as a general rule, a failure to observe these precautions, where an injury is the result, may deprive them of the right to recover, even if the defendant has been remiss in making use of the ordinary signals of warning and other expedients, as the ringing of bells, the blowing of whistles, the slackening of speed, etc., for avoiding casualties. Especially is this so, if the injury was not occasioned by this omission of duty, and would have occurred if it had been fully and faithfully observed.

These questions have very recently undergone thorough examination, and have been very fully discussed by the supreme court of North Carolina, in the case of *Parker, Adm'r, v. Wilmington & Weldon R. R. Co.*, 86 N. C. Rep.; s.c., 8 Am. & Eng. R. R. Cas. 420. Smith, C. J., delivering the opinion, says: "The only possible imputation upon the prudent conduct of the engineer is in the omission to give warning in season to keep off persons about to cross, but even this does not dispense with all personal attention to one's own safety. If the omission be neglect in the company, much greater is the neglect of the deceased, who, when aware of the runnings of the regular trains, and just when one was expected, walks and remains upon the track without looking out for its approach, or making any movement to get out of the way, until, rushing on, it strikes him to the earth. It is to be presumed that a rational being will not needlessly venture into places of peril, and if he does, that he will use proper precautions to guard against injury. If he fails to do either, and suffers dam-

age in consequence, it must be regarded as caused by his own rash act and inattention to his own security."

" 'Negligence is a relative term,' remarks the supreme court of New Jersey, in *N. J. Ex. Co. v Nichols*, 3 New Jersey, 439, 'depending upon the circumstances under which the injury was received and the obligation which rests on the party injured to care for his personal safety. A person crossing a railroad track, though rightfully there, must be on the alert to avoid injury from trains that may happen to be passing.'

" 'The company's servants may ordinarily presume,' is the conclusion derived from an examination of numerous cases by a recent author, whose work exhibits large research and precision of statement, 'that a person of full age and capacity who is walking on the track at some distance before the engine, will leave it in time to save himself from harm; or, if approaching the track, that he will stop if it becomes dangerous for him to cross it. This presumption may not be justified, under some circumstances, as when the person on the track appears to be intoxicated, asleep, or otherwise off his guard.' *Pierce on Railroads*, 331. 'The more approved statement of the doctrine of contributory negligence,' says the same author, 'is that a person cannot recover for an injury to which he contributed by his own want of ordinary care.' *Ib.* 323. The only culpability which can be charged upon the company is the failure to give the precautionary signal of the approach to an intersecting way, where travellers might be expected to be found, and thus prevent their moving upon the track; but this omission, when in no manner causing or contributing to the injury, does not impose a liability upon the company. If the traveller knew by other means of the coming train, the omitted warnings could not be deemed the cause of the collision. *Ib.* 351.

"But, without accumulating references to the numerous decided cases, of which the defendant's counsel has furnished us many very much in point, we prefer to rest our decision upon the authority of a recent case, clearly resembling that before us, and in which a large array of cases was brought to the attention of the Supreme Court. *Railroad Co. v. Houston*, 95 U. S. Rep. 697. Mr. Justice Field says: 'If the positions most advantageous for the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed solely to the negligence, unskilfulness or criminal intent of the defendant's engineer. Had the train been moving at an ordinary rate of speed, it would have been impossible for him to stop the engine when within four feet of the deceased. . . . The failure of the engineer to sound the whistle, or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the

company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly on the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held liable for a failure of experiments of that kind.' "

In *Southwestern R. R. v. Johnson*, 60 Ga. 667, this court held that where the plaintiff's husband, at the time he was killed, was lying upon the defendant's railroad track, where the public road crossed the same, she could not recover, although the defendant "was negligent in not blowing its whistle at the proper time at crossing the public road, and checking up its train of cars," because the deceased, "according to the evidence, could, by ordinary care, have avoided the consequences to himself caused by the defendant's negligence." It cannot be claimed in this case, that the plaintiff's injury was caused by the unusual speed of the train, or by the failure of the company's agents to blow the whistle or ring the bell, for the plaintiff had seen the train a long distance off, and appeared quite indifferent as to its approach, he neither felt nor manifested any apprehension of danger from a collision, he leisurely pursued his way until it came quite near him. When he got upon the side path, he did not get far enough from the cars to prevent his being stricken by a plank or piece of timber projecting some six or eight feet beyond the side of the platform car, but was, as he insists, at a sufficient distance to avoid collision with the cars. This was the only negligence, if negligence it can be considered, on the part of the defendant, to which he can attribute the injury he received. The evidence leaves it very doubtful whether the injury could have been caused by a blow from this plank or timber. It projected so far beyond the place where he was standing, that the end of it could not have scraped the side of his jaw, even though he threw his head back when he saw the projecting plank. According to his own account, he was three feet from the track at that time, and the plank projected six or eight feet from the car; the blow, which was a "glancing blow" and "just did scrape his jaw," had sufficient force to "knock him down," and to draw him under the wheels of the passing car, which inflicted upon him the serious injury that maimed him for life. It is probable that he is mistaken as to the manner and source from which he received this

injury. A blow from the plank might have thrown him from, instead of under, the train, according to the angle made by the projection, as to which there is no proof. If the plank had projected only six feet, and he was three feet from the track, then he must have been stricken about midway the distance it projected. The persons on the train place him much nearer the cars than three feet, and their version of the affair seems well sustained by the circumstances attending the catastrophe. It is not improbable that he came in collision with the stirrup that held the standards on the car, and that the collision thus brought about threw him under the train, and caused the injury; his companion was standing further from the cars than he was; she was on the outer part of the path, and a "little in front of him," and received no injury. True she was not as tall as he was, but the evidence does not show the difference in their height, or whether she was tall enough to have been reached either by the side of the car or the plank resting on and projecting from it. Besides, if the damage was done by this plank or piece of timber, it appears to us, that it would, in all probability, have been fatal, for when it came in contact with an upright iron switch, a short distance from the scene of the disaster, the collision was so violent that it shattered the switch, and left a deep dent in the timber itself. This casualty, we apprehend, should be attributed to the plaintiff's temerity. He should have left the track some time before, as the other children then on it much more prudently did; then he would have had ample time and opportunity to have looked about him and to have avoided the danger. If, seeing the approaching train, and knowing the danger of meeting it, as he must be presumed to have done, he tried to see how near he could get to it without injury, the defendant should not be held responsible for the result of the experiment; and if, when he did leave the track, he made a mistake as to how near he might stand with safety to himself, surely the railroad company should not be charged with the consequences of this mistake. It was claimed, however, by the defendant, and we think rightly, that this party was ab initio a trespasser upon its track and embankments, and was such as long as he remained there; and while it is conceded that it would be liable for a wanton or wilful wrong of its agents, acting within the scope of their duty, or even in cases of gross negligence or carelessness, evincing reckless disregard of the safety of others, or where they perceived the danger of a party in time, and made no effort to avert it, yet it maintains that it is under no such obligations to trespassers as to those who are properly and lawfully upon its premises, for the purpose of either transacting legitimate business with it, or in furtherance of rights reserved to them by law.

In view of the fearful frequency of the unauthorized use of railroad tracks and embankments as foot paths, and of the perils to

which pedestrians, as well as the trains themselves, the persons managing them, the passengers and freights with which they are loaded, are constantly exposed from this highly reprehensible practice, it may be well to state at greater length than has already been done the relative rights and duties of parties to suits brought for redress of injuries happening under such circumstances. In the case of *Mulherrin v. Delaware, Lack., & W. R. R.*, 81 Penn. St. 366, already referred to, the supreme court of Pennsylvania says: "The company have not only a right of way, but such right is exclusive at all times and for all purposes. This is necessary, not only for the company's rights, but also for the safety of the travelling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of one single foolhardy man, who desires to walk upon the track. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad (3 and 4 Vic. Ch. 97, § 16). It would add materially to the public safety, were there a similar law here." It would be a striking anomaly, were railroad companies held to the same measure of care for the safety of mere wrong-doers as for those engaged in their service, or placed under their care, or who are authorized by the law to use the crossings over their tracks, or to visit their stations or other portions of their road upon business connected with them; but the law tolerates no such absurdity; it recognizes and enforces a clear distinction in this respect as to these different classes of persons. It requires diligence in proportion to the duty imposed, and the degree of negligence imputed must correspond to the degree of diligence exacted. Wharton Neg., § 48. "In determining the care and diligence to which any one is bound, it is necessary to distinguish first between the obligations of persons who do, and of those who do not stand in peculiar relations to one another. It is the duty of every man to conduct himself, and to manage his property with ordinary care and diligence, and with no more than that, unless he has increased or diminished his responsibility by assuming some special relation with the person who seeks to enforce it. But if one does an act of pure favor for another, with the assent of the latter, his responsibility to him is reduced to the duty of merely slight care and diligence, to which extent, however, he is bound. And on the other hand, the party receiving the favor is bound to exercise great care and diligence therein for the benefit of the party conferring it." Shear. and Redf. Neg., § 22; *Central R. R. v. Henderson*, decided at this term. But as "the common law has a peculiar regard for human life, and for this reason exacts a greater degree of care when life is at peril than in relation to any matter of mere property, it requires from all persons, including those who render gratuitous services, at least ordinary care for the safety of life." *Ib.* § 24. There is certainly a difference as to the degree



of care to be observed by the company's servants to one who avails himself of a gratuitous privilege and a wrong-doer. The case of *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 507, taken in connection with the foregoing, will make this distinction plain. "Where both parties are equally in the position of right, which they hold independent of the favor of each other, the plaintiff is only bound to show that the injury was produced by the negligence of the defendant, and that he exercised ordinary care or diligence in endeavoring to avoid it. But where the plaintiff is himself in the wrong, or not in the exercise of a legal right, or was at the time enjoying a privilege or favor granted without compensation or benefit to the party granting it, and of whose carelessness complaint is made, he, the plaintiff, must use extraordinary care, before he can complain of the negligence of another. *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585." To the same effect is *Shear. and Redf. Neg.*, § 491, and cases cited in notes there.

How do the cases determined by our own court accord with these views and principles? In an early case (*Flanders v. Meath*, 27 Ga. 358), the plaintiff, a child of tender years, was seriously injured by a dray passing down the streets of Macon, at a very rapid rate. There was a school which plaintiff attended, just opposite her parents' residence and the place where the injury was inflicted; in this part of the street the school children were in the habit of playing. On this occasion a rain was coming up, and the dray was partially loaded with meal and flour; the plaintiff ran in front of the mules, passed their heads, and was caught under the hind wheels and injured. She had been in the habit of thus running before passing drays and other vehicles on the streets, and came near being hurt on several occasions previously. Her parents were informed of this and told, if they did not keep her out of the streets, she would some day be injured. The jury found a verdict of \$50 in her favor, a new trial was moved for and granted, because of the inadequacy of the damages. This court reversed the judgment granting the new trial, and held that, notwithstanding the jury might think the person injured altogether in fault, yet, if from pity, or any other consideration, they should return a verdict for damages, and the defendant acquiesced in it, the plaintiff could not complain and demand a new trial, although her injury was serious and the damages found were almost nominal; thus clearly intimating that had the defendant sought to set aside this verdict by moving for a new trial, his motion should have been granted. In *Sims v. Macon & Western R. R. Co.*, 28 Ga. 93, the plaintiff's slave, who was killed by the train, had seated himself upon the end of a cross-tie; the train was visible at the distance of 1000 yards; the negro had probably fallen asleep, and neither saw nor heard the approaching train. The engineer did not blow the whistle, nor did he slacken the speed at which he was running un-

til he got too close to avoid the collision. Under these circumstances a non-suit was awarded, and properly so, as this court held. The conduct of the negro was deemed "gross negligence," which deprived the plaintiff of his right to recover damages. Benning, J., who delivered the opinion, said: "Whether the negro was awake or was asleep, we cannot know. But, at first, the engine man had the right to presume he was awake. He was sitting up, not lying down—sitting on the end of a cross-tie. This commonly is the attitude of a person awake. The engine man, then, had, at first, the right to presume the negro to be awake. And whatever presumption he had the right to make, he had the right to act on." Again in another part of the same decision, this able and enlightened judge declares, "If a person on a railroad track, as a trespasser, is aware of the approach of a train, it is his duty to get off the track, out of the way of the train, and it is not the duty of the engine man to stop the train, or even to blow the whistle; certainly it cannot be his duty to blow the whistle until the train has come almost quite up to the person. Of what use could it be? This, I suppose, will not be disputed." In *So. West. R. R. v. Hankerson*, 61 Ga. 114, Hankerson was lying on the track, just beyond the crossing, in a state of insensibility, whether from drunkenness or a sudden accession of disease, the evidence leaves in doubt; he was seen by the engineer at the signal post, who mistook him for a hog that had been killed by a freight train just ahead of him; did not discover that it was a man until he got within 100 or 125 yards of him, when he immediately used all the appliances at his command to awaken him and to stop the train, but did not succeed; the train ran over and injured him. Warner, C. J., said in delivering the opinion of the court: "If the plaintiff was voluntarily drunk, and in that condition placed himself on the defendant's railroad track, he was not entitled to recover at all, under the provisions of the 2972 section of the Code, whether the defendant was negligent or not. But if he was not drunk, and could not have controlled his powers of locomotion from a sudden attack of disease or other involuntary cause, and in consequence thereof was involuntarily upon the defendant's railroad track, then the question of negligence might have arisen under the provisions of the 3034th section of the Code." In *The Georgia R. R. & Bkg. Co. v. Nasby*, 56 Ga. 540, a verdict given on account of contributory negligence in the killing of a mule and crippling a colt by the train of defendant, under the following facts was set aside by this court: The plaintiff, who lived near the railroad, hobbled the mule, and turned it and the colt out at night to graze; they got upon the track, and were seen ahead of the train, as far as the head-light would enable the engineer to perceive them. He used all the means in his power to stop the train, but could not do so, on account of being on a down grade, nor was he more successful



in frightening them from the track by the use of the whistle. Bleckley, J., delivering the opinion, said: "On scrutinizing the evidence before us, we are of opinion that the company's agents were not wanting in ordinary care or reasonable diligence; and that the verdict which was rendered on the basis of contributory negligence cannot be upheld. The evidence is not conflicting or inadequate. The burden of proof, cast by law on the defendant, has been removed."

So too, in the case of *Vickers v. The A. & W. P. R. R. Co.*, 64 Ga. 306. Where a child of ten years of age was allowed, with others, by the defendant's employees to get on and jump off the cars while in motion, and the engineer in charge, only one or two days before the injury occurred, put the plaintiff on the engine while in motion, and then and there bought ground-peas from him, for which he did not pay, and told him to come back for his pay on the day of the injury, and plaintiff, in compliance with the request, returned, and in jumping on the engine while in motion, fell through, and the train ran over his leg and crushed it, so that amputation was necessary, and the court below awarded a non-suit, this court, reversing that decision, held that where the law raises a presumption of negligence against the defendant by reason of the mere fact that the physical injury was inflicted by means of running its locomotive, and where, owing to special circumstances touching the conduct of the engineer toward the plaintiff, a child of only ten years of age, it is not altogether certain that the presumption is rebutted; and where on account of the plaintiff's tender years and his consequent immaturity of understanding, he is not amenable to so high a standing of diligence in regard to his own safety as that which adults are obliged to observe, the case made by the plaintiff's evidence is more properly one for the jury than the court, and a motion for a non-suit should be denied. In discussing the propriety of this non-suit, Bleckley, J., remarks: "The present is not quite a case for a non-suit, though its neighborhood to that class seems very near." In our case, the injured party had attained an age (fifteen) when by law the immaturity of his understanding was not to be presumed as freeing him from the consequences of his own voluntary act (Code, § 4294); but under ten years, and between that and fourteen, the presumption is otherwise; he is not to be held accountable unless he knows the distinction between good and evil; or at or below ten years of age, unless it be shown from the evidence that he is "impressed with a sufficient sense of moral obligation," or is "possessed of sufficient capacity to have deliberately committed the act with a full knowledge of its consequences." (Ib. 4295.) While this section of the Code relates to an infant's accountability for criminal offences, yet in cases of tort, he is equally responsible, provided he has reached

those "years of discretion and accountability" prescribed by the Code for such offences. (Ib. § 3064.)

But the difference between this case and the one under examination does not end here. In Vickers' case, the boy of ten was invited on the engine, while it was in motion, by the man having charge of it; in this, no such invitation or inducement was held out. On the contrary, complaint had been made, by at least one of the employees of the road, of his intrusion upon its track and embankment.

But it was urged by the distinguished counsel for the plaintiff, who, when on the bench of the superior court, determined the case of *Baston v. The Georgia R. R. Co.*, reported in 60 Ga. 339, that the present case is precisely within the rules laid down by this court in that, in reversing the judgment awarding a non-suit by the lower court. We respectfully differ from our learned brother; the cases are essentially different in most of their features.

We do not intend, by anything we have said, to intimate an opinion, whether a non-suit in this case would have been proper. No such question was made in the lower court, and we abstain from going outside the record to search for points, which may possibly not arise in the further progress of the litigation, and by anticipation, to forestall their discussion and investigation. When this question shall properly come before us, if it ever does, it will be time enough to determine it. In that case, the plaintiff was upon the defendant's line of railway by its consent, walking on the track at a certain point, about nine o'clock at night; when the train came behind him in the dark, he stepped six or seven feet from the track,—far enough ordinarily to be secure from danger from the running of a train, but was prevented from going further by a hedge or thicket of briars left growing on defendant's right of way; several trains passed him in safety to himself when a piece of timber, projecting from one of the rear trains, struck him on the head, felling him to the ground and injuring him seriously; this injury was the result of gross negligence on the part of the defendant in loading its cars with freight in such an unusual manner, and in permitting the piece of timber to project so far off of the track of its road. Jackson, J., delivering the opinion, remarked: "Taking these allegations to be true, the plaintiff would be entitled to recover. Even a trespasser upon the track of a railroad is entitled to be protected against gross negligence. . . . But this is the case of a man going from one point to another on the track of the road, by its consent, and who, therefore, is not a trespasser, but was entitled to greater consideration than a mere trespasser would be entitled to claim." The judge then goes on to show that these circumstances, all taken together, as we understand the decision, made out a case of gross negligence on the part of the defendant.

Now, mark the difference between this case and that under con-

sideration. In the latter, there was no consent upon the part of the company, either express or implied, that the plaintiff should use the road in the manner he did. It was not pretended that there was any express consent, but an attempt was made to imply consent from the frequent use of the track and embankment by the plaintiff and others, in a similar manner and for like purposes, without effort on the part of the defendant to prevent it. In this case, the plaintiff was on the track in the day time; in that, in the night. In the one, anything that threatened danger, as the projecting timber, was plainly visible to one on the alert and making proper use of his senses; in the other, on account of the darkness, it was not discernable, however vigilant the plaintiff might have been. In the one, there was no obstacle to prevent the party from going further from the passing train; in the other, there was, and that obstacle was allowed by the company to remain there. In the latter, it appears positively that the train was negligently loaded, and that, by means of this negligent loading, the timber which did the damage projected an unusual distance from the car, over the track; whereas, in our case, the train was examined upon starting from McBean's station, thirty miles off from the place of the accident, and found in perfect order. It was not a loaded train, and the piece of plank or timber that was alleged to have caused the injury was not seen to project, until within about two miles of Lawtonville, where an attempt was made to call the attention of those in charge of the train to the fact; but the signal given was not understood. The inference is clear that, in starting, this piece of timber was in its proper place, and was jostled out of position during the run, and was not discovered by the train hands in time to replace it. The empty train was going for a load, and did not stop at the customary stations. In Baston's case, it must be taken as true that the injury complained of was certainly done by the projecting timber; while in this, the probabilities are that it was not done in any such manner, but by contact with the cars. In that case, timely effort was made, and the party got a reasonably safe distance from danger, under ordinary circumstances, at least as far as he could go without running into the thicket of briars; in this, there was no effort made to escape danger, until the train was close up to the plaintiff, and then he did not leave the track further than three feet, although there was nothing to prevent his going further and beyond the reach of all danger. In that case, as before remarked, the plaintiff, from the darkness of the night, by the use of the utmost vigilance could not have perceived his danger, and made proper effort to avoid it; but this damage occurred in the broad light of day. If any, the least, vigilance had been used, the projecting plank could have been seen; and when seen, contact with it might have been avoided by stooping low or sitting down, if not by a retreat down the embankment. From some evi-

dence in the record, it seems that the attention of the plaintiff was, at that time, fixed on the car-wheels rather than upon the body or bulk of the train or its load.

6. Whether the consent of the company can be implied from such use of the track by unauthorized persons as that set up in this case, has been seldom directly passed upon by our courts, so far as we can find; but it has been repeatedly passed upon by the courts of some of our sister States, and by them settled, upon principles, as it seems to us, too clear for doubt, some of which we have already discussed, as those relating to the company's right to the exclusive use of its road-bed, embankments and cuts, and the obligation and duty of others to abstain, without its consent, from their use, except at crossings, where the public have a right of way.

To consent is one thing, and is quite different from mere forbearance, on the part of the defendant, to seek redress, whenever its rights are temporarily invaded by a wrong-doer. By endurance or toleration of a trespass, we do not understand that any of a party's privileges and rights are necessarily waived or yielded, or that it ceased to be entitled to the protection afforded by the law. By direct consent to the use of its way, it certainly waives any right to proceed against one thus found thereon, for any wrong that may be imputed on account of such use. There can be no right set up by the public from mere user, however frequent or long-continued it may be. It is so inconsistent with the rights and obligations of the company that it cannot, without more, be presumed to have consented to it; least of all can it be claimed, with any show of reason, that the right of the public has, by such facts, become adverse to the right of the owner of the road. That this adverse holding is essential to the right set up here, and which it is insisted the defendant was bound to respect, and that it must be derived from the consent of the owner, see *Irwin v. Dixon et al.*, 9 Howard R. 10. It is not believed that any length of forbearance to take legal proceedings against trespassers, or to warn them from the bed on which a railroad track is constructed, will amount to a dedication of the same to the use of the public, as a way for pedestrians. No such case has been brought to our attention, and our own research has discovered none. If such a one existed, we are satisfied that it would be in direct contradiction to principles too long and too firmly established to be called in question at this late day. "If the owner of lands," declares our Code, § 2684, "either expressly or by his acts, dedicates the same to public use, and the same is used for such a length of time that the public accommodation or private rights might be materially affected by an interruption of the enjoyment, he cannot afterwards appropriate it to private purposes."

When a railroad company, by authority of law, goes into pos-

session of land for the objects of its creation, is not that an appropriation to certain great specified public uses? And can it divert its use to purposes wholly inconsistent with those which it is authorized to pursue,—purposes which may imperil the lives and property of travellers and freighters on its trains, without incurring a forfeiture of its privileges? To ask, it seems to us, is to answer these questions. Now would it be fair to presume that, from its inability or reluctance, from prudential or other laudable considerations, to prosecute or warn off trespassers from its track, it thereby consented to its appropriation to uses wholly inconsistent with its obligations and duties to the public? It might be sufficient to answer that, upon principle and authority, no such presumption arises. This conclusion, however, is fully sustained by the cases.

In the case of the Illinois Central R. R. Co. v. Godfrey, already referred to in this opinion, it is said (71 Ill. R. 506): "The plaintiff was travelling upon defendant's right of way, not for any purposes of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home, on return after a search for his cow. There was nothing to exempt him from the character of a trespasser and wrong-doer for so doing, further than the supposed implied assent of the company arising from their non-interference with previous like practice by individuals. But because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty, or impose an obligation on the part of the owner to provide against the danger of accident." *Sweeny v. Old Colony, etc., Ry. Co.*, 10 Allen, 373; *Hickey v. Boston & Lowell Ry. Co.*, 14 Ib. 429; *Phila. R. R. Co. v. Hummell*, 44 Penn. St. 375; *Gillis v. Penn. Ry. Co.*, 59 Ib. 129.

"For all the purposes of this suit, the plaintiff stands in no more favorable condition than that of a wrong-doer and trespasser. He was not, at the time of the accident, in the exercise of a legal right, and was in the enjoyment of no more than a bare license or assent tacitly given, and his duty and the obligation of the company are to be measured as in the case of one thus situated." In confirmation of this ruling we cite *Illinois Cent. R. R. v. Hetherington*, 83 Ill. 510; *Finlayson v. Chicago R. R. Co.*, 1 Dillon, 579; *Galena, etc., R. R. Co. v. Jacobs*, 20 Ill. 478; *Bancroft v. Boston, etc., R. R. Co.*, 97 Mass. 276; *Nicholson v. Erie R. R.*



Co., 41 N. Y. 426; *Sutton v. N. Y. Cent. & H. Riv. R. R. Co.*, 66 Ib. 243; 243 *Matz v. N. Y. Cent. & H. Riv. R. R. Co.*, 1 Hun, 417.

That the plaintiff was a trespasser is equally as clear from the Code as from these several decisions. "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a cause of action." Code, § 3013. "Bare possession of land authorizes the possessor to recover damages from any person who wrongfully, in any manner, interferes with such possession." Ib. § 3015. Again, and still more pointedly, is the following: "The owner of realty having title downward and upward indefinitely, an unlawful interference with his rights, below or above the surface, alike gives him a right of action." Ib. § 3020. So, such an interference "with a right of way or of common is a trespass to the party entitled." Ib. § 3021.

It is not perceived how this principle can be affected by a difference in locality, as in a town, city, village or county, or by the number of persons violating the right, or the frequency or length of time in which it is violated by any or all of those taking such unwarrantable liberties. Circumstances alter cases, but principles never; circumstances vary constantly, but principles are permanent and unchangeable, however numerous and diversified may be the facts to which they apply. In the case of the *Illinois Central R. R. Co. v. Godfrey*, the injury in question occurred in the incorporated town of Decatur. A large number of the inhabitants of that town were in the habit, and had been for a long time, of using the railroad track there as the plaintiff used it when he was injured; an ordinance of the town required the slackening of speed and the use of cautionary signals when the trains were running through it, but which does not appear to have been done. It was held that no license could be implied from such customary use of the track, and the plaintiff could be regarded in no other light than a trespasser; and what is true of this case, is quite true of some of the others above cited.

The case of *Holmes v. The Central R. R. Co.*, 37 Ga. 393, forms no exception to them, in any material respect. "The spot at which the engine killed the plaintiff's slave (in that case) was seventy or eighty yards from the public road; but it was on a part of the track used very much by foot-passengers to make a short cut from one to another of the public roads which was known to defendant's agents. It was down grade at that point, and the view was there obstructed by a cut. The killing took place near midnight. The blow-posts were not at such distance from the public crossings as was required by law, and it was doubtful, from the testimony, whether the engineer blew the whistle when he passed the blow-posts. The engine was going at the usual

speed at the time; the slave was on the track, but not standing up; the engineer did not see him until he was struck by the engine, and then supposed he was a hog or a sheep."

Among other things, Judge Gibson, of the superior court, charged the jury "that the track of a railroad company is not a public highway; and persons who use the same in pursuit of their ordinary private business, except at a public road-crossing, are actual trespassers;" and this court, addressing itself to that portion of the charge, said: "By the act" (regulating the conduct of trains at public crossings) "certain things were required to be done by railroads, and certain liabilities incurred in case of failure. This act was intended for the protection of persons and property at public crossings of the road. The public have a right to cross the railroad track at the public road-crossings. When travelling the highway, persons are lawfully on the railroad track at the point of crossing; and if an injury is done at such public crossing, then the provisions of the act of 1852 become material. In this case, the accident having occurred elsewhere, the provisions of the act are not applicable. The fact that so many persons travelled on foot over the portion of the road where the negro was killed, did not make the railroad a public road." In connection with this, and a little farther on in the case, it is said, "The negro was on the road of the defendant at a point where he had no right to be."

This decision settles two points, viz.: that such use of the railroad track is a trespass, and that the consent of the company thereto cannot be inferred from its habitual use, although its agents were well apprised of the fact that it was thus used. It is true, in this case, that the judge in the lower court refused to charge, at the request of the defendant's counsel, that the defendant was not liable, unless guilty of gross negligence, and that this court approved the refusal; but it is also true that this court held that the new trial, setting aside the verdict in favor of the plaintiff, was very properly granted, on the ground that the verdict was against the evidence. It would be a mistake to suppose that the conclusion here is based upon the ground that the defendant was not guilty of gross negligence, in the absolute and statutory sense of that term. Under the numerous cases cited from our own reports, it is quite apparent that complete protection is afforded the defendant, 1st, where it is shown that "all ordinary and reasonable care and diligence" have been exercised; 2d, where the plaintiff could, by ordinary care, have avoided the consequences to himself, although caused by the defendant's negligence; 3d, where the injury is done by plaintiff's consent, or is caused by his own negligence.

These rules are taken from Code, §§ 2972, 3033 and 3034, each of which is an essential part of an entire scheme. As a whole, they relate to the same subject, are in *pari materia*, and should be so construed as to harmonize them, and at the same time to give effect



to each particular portion of them. It should be observed that the judgment granting a new trial, in the last cited case, was put upon section 3033 of the Code, and that the other two sections were neither cited nor commented upon by the judge delivering the opinion.

It has been shown, in the course of this opinion, that even where the plaintiff could, by ordinary care, have avoided the injury caused by the defendant's negligence, or where it is solely attributable to his own negligence, yet if the conduct of the defendant was so grossly negligent as to evince wilfulness, or if he perceived the plaintiff's danger in time to have averted it, and made no proper effort to do so, then he would be liable for the consequences. This addition is essential, as it seems, to carry into full effect the evident design of the Code, although that purpose may not be therein expressed in terms. The term "gross negligence," used in connection with such circumstances, has a relative, rather than an absolute and strict signification, and as thus used, is the equivalent of acts which result from a failure to observe that "ordinary and reasonable care and diligence" prescribed by our Code. It was certainly used in this connection in all the cases herein cited, including that of *Boston v. The Georgia R. R.*

The complaint made in this case by one of the defendant's employees to the plaintiff, and the warning thus given him of the danger he incurred by using this track and embankment as a footway, deprives him of the right to complain of the injury he brought upon himself by his failure to heed this friendly admonition and caution. *Hughes v. Macfie*, 2 Hurlst. and Colt. 744. In *Chicago and N. West. R. R. v. Smith*, 46 Mich. 504: "A child, eight years old, was injured by the sudden starting of a locomotive, on the step of which he had been standing, and from which he had just been ordered away by the fireman. He was a trespasser on the premises, had been warned against going there, and had more than ordinary intelligence. It was held that the company could not be made liable, without proof that the employees knew that he was in the way at the moment, or were reckless or negligent in their management, or could have anticipated the injury." This, we apprehend, is a fair statement of the rule of the company's liability, under the circumstances disclosed by the record before us, and we adopt it as our own.

The *Central R. R. v. Glass*, 60 Ga. 441, bears no resemblance to the present case, and is wholly unlike it in all its material features. Glass got on the cars of the defendant, drunk, with the knowledge and consent of its conductor. Failing to give up his ticket when called upon, he was carried past three stations, and when within three quarters of a mile, or a mile, of the fourth station, he was put off by the conductor and brakeman, while still drunk, on an embankment, which was two hundred yards from a crossing, he saying

that he would walk to Jonesboro, but started in the opposite direction. When he got about a mile off, he lay down on the track, and was run over and seriously hurt by the up train from Macon to Atlanta. Although the conductor and engineer of this train had been notified that he was put off at this point by the down train, and requested to keep a lookout for him, they failed to do this. The verdict in his favor was properly sustained by the lower court and by this court. Glass was rightly on that train as a passenger, and was under the care of the agents of the road. If put off for failing to produce a ticket, he should have been ejected at some station or other safe place; and in his then drunken and helpless condition he should not have been dumped off without his safety being looked after. The difference between that case and this is most marked. Not to mention others, the plaintiff here was on defendant's track, without the knowledge of its agents, and in defiance of their warning and request to keep off the track. They had no agency in placing him there; whereas, in the other case, the plaintiff was placed in his dangerous situation by the company's servants.

Believing that the defendant's conduct amounted to gross negligence, and that, by the exercise of ordinary care, the consequences to himself could have been avoided, it follows that this verdict should have been set aside and a new trial granted, upon the ground that the finding is contrary to law and evidence.

7. But this is the third finding by juries in this case. On the first trial the verdict was for \$10,000, which was set aside by this court, because of erroneous charges by the presiding judge; the second was for \$12,500, which was set aside for the irregular and improper conduct of a juror, and no writ of error was taken to that decision of the court below. In the present trial the finding for the plaintiff was \$11,500, and a motion was made to set it aside and a new trial asked, among others; upon the ground that this finding is excessive, and not warranted by the law and the testimony in the case. If the plaintiff was entitled to recover at all, he was only entitled upon the idea that the defendant had contributed to the negligence that resulted in the injury for which he sought damages; indeed, this is the sole ground upon which his right was urged by his able counsel in this court. Under this view, this finding is so excessive as to lead us to infer if not bias for the plaintiff, and prejudice against the company, at least a total misapprehension by the triors of the principles of law which were given in charge by the judge trying the cause. Code, §§ 3067, 2947. The Savannah F. & W. R. R. Co. v. Harper, decided at this term, in which the cases upon the subject are collected and reviewed.

8. Exception is taken to this charge of the judge given without qualification, at the request of plaintiff's counsel:

"A railroad company is bound to use ordinary care in the run-

ning of its trains, to prevent them from coming in collision with the person of another; and this it is bound to use, even if that other is, on his side, in some degree negligent; therefore, if damage happen to such other person by a collision which the company by the use of ordinary care might have prevented, the company must make good the damage."

It is objected by defendant's counsel, that the case put was clearly one of contributory negligence, and that his honor told the jury "the company must make good the damage," from which they were left to infer that they were at liberty to find the entire amount of the damage done to the plaintiff, without making any abatement for the negligence chargeable to him. The error complained of is manifest. See this case 64 Ga., *ut supra*, and Code, §§ 2972, 3034, and cases cited in edition of 1882, under each of these sections. The judge certifies that, in connection with this request, he called the attention of the jury to his general charge. It does not appear, however, that he specified the portion of the charge that had relation to this particular subject. The portion of the charge referred to by him correctly laid down the measure of damages in cases of contributory negligence, and was in apparent, if not direct, conflict with the charge requested and given. The error complained of was not corrected in this way; the attempt to do so was well calculated to mislead and confuse, instead of enlightening, the jury. The charge should have been refused altogether, or the objectionable portion should have been stricken, and the rule prescribed by the Code for measuring damages in such a case substituted.

9. In taking leave of this case, it may not be amiss to call the attention of the general assembly to the growing evil of using railroad tracks and embankments as foot-ways, and to invoke their interposition to prevent, by appropriate legislation, a practice so fraught with peril, not only to the running of the trains and the passengers and freights upon them, but also as a safeguard and protection to the unwary and reckless, who commit such trespasses and take such frequent and frightful hazards.

The judgment of the court, as now constituted, is put upon the last ground only. It is proper to state, in this connection, that this opinion was prepared and written in accordance with what were understood to be the views, as expressed in several consultations with me, of our esteemed and lamented colleague, the late Justice Crawford.

After it was prepared, his extreme sickness forbade its being presented, and he had no opportunity of finally revising and of approving or disapproving, or modifying it.

Judgment reversed.

JACKSON, C. J.—1. I concur in the judgment of this court

granting a new trial in this case, on the ground that the court erred in charging the jury, as requested by the plaintiff below, to the effect that, though that plaintiff was himself negligent, the railroad company must make good the damage.

The words "must make good the damage," without qualification, would convey the idea that the company must, in such a case, pay full damage, and thus withdrew from the jury the consideration of the doctrine of contributory negligence as lessening the damage which the jury should give in such a case. No matter how negligent the company may have been, yet, if the plaintiff was also negligent, full damage ought not to be given, but the damage should be diminished in the proportion which the negligence of the plaintiff bore to that of the company. So declares our Code, and so this court has ruled again and again. The doctrine was applicable to this case, and should have been considered by the jury and weighed in the scales of the evidence, and decided as their judgment on those facts determined, on a scrutiny of the negligence of both parties. The effect of the charge as given was to withdraw the contributory negligence of the plaintiff, if the jury found that he did contribute, from the jury, and thus to hurt the defendant.

It is true, that in the general charge the court does give the jury that doctrine, but this request, coming afterwards, and being given without any qualification at the time it was given, was well calculated to mislead the jury, and may have done so.

I am the more satisfied to concur with my colleague in the grant of a new trial in this case, because I believe, from our consultations upon it, that my late much-lamented colleague, Judge Crawford, was very decided in the opinion that it ought to be granted; and had he lived, he might possibly have gone to the full extent of denying any recovery, to which Judge Hall has gone in the opinion just delivered.

2. To that extent I cannot go. Where a parcel of youths and children are in the habit of passing to and from school on a path within the right of way of a railroad company, and have been for years in that habit within the limits of a village, in the knowledge of the railroad authorities, I cannot hold them to be trespassers to the extent and in the sense that the railroad company are only liable for gross negligence if any of them be killed or injured. On the contrary, I hold that the company is bound to use all ordinary and reasonable care and diligence to avoid injury to them, and neglect to use such reasonable and ordinary care and diligence would make the company liable. The rule in respect to passengers, diligence toward them, is extraordinary care and diligence. It is that which a common carrier, which the company becomes, must use. Code, §§ 2066, 2067, 2083.

The rule in the case of persons not passengers is that which I

have given above, "all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Code, § 3033.

And this rule has been applied by this court to a person not at all rightfully on the railroad track, but wrongfully there, sixty yards from a crossing, without any consent of the company, express or implied. 37 Ga. 593.

In that case, gross negligence was expressly denied to be that neglect which would make the company liable, but it was held by the unanimous court that the measure of the liability is "all ordinary and reasonable care and diligence, not gross negligence as was insisted by counsel for defendant in error," in that case. But if gross negligence be the rule in the case at bar, it is for the jury to say whether the neglect to ring, to slacken speed, and having the scantling projected out as it was, be not gross negligence.

Such is the law of this State, plainly written and printed in her statute book and ruled and applied by her highest court.

The question of negligence is for the jury. 34 Ga. 330, and following cases *passim*. The quantum of diligence required of the railroad company by the law being given by the court, it is for the jury to say whether or not facts proved make that quantum, subject of course to a review by the court to see whether the jury had enough testimony in to support the verdict. As the case goes back, I dislike to argue the facts or pass upon them at all. The views submitted by my associate make it necessary that I say that, if the railroad train swept through that village without ringing its bell or slacking its speed, with a scantling projecting unusually from its car, beyond the track, though within the right of way of the company, and thereby a youth was hurt in its rapid transit, the company is liable, unless by the use of ordinary care he could have avoided the consequences to himself of such transit, or the injury was caused by his own negligence alone. If both himself and the agents of the company were to blame, or were at fault, but neither the sole cause of the injury, and if he could not by ordinary care have avoided the consequences to himself, then the damages should be apportioned in proportion to the default of each. Under our law, it is for the jury to pass upon all these questions of diligence and negligence and ordinary care in avoiding the consequences of such negligence or want of diligence when the emergency is upon the party complaining. The age of the plaintiff, his youth, should be considered on the one hand, and previous warnings, if any were given, on the other, and in the light of these and all other facts and circumstances proved, the jury should make their verdict.

Such, I think, is the law of Georgia applicable to the facts of this record; and I do not propose to examine the law of England or of other States on the issues made. The statutes of this State



and the judgments of this court thereon construing them bind me.

3. The main question, I think, is ruled in the case of *Baston v. The Central R. R. Co.*, 60 Ga. 339. The only possible distinction between that case and this is that there the declaration alleged that the plaintiff was upon the railroad track by its consent, and here no express consent is proved. But in the *Baston* case the declaration does not aver express consent, and inasmuch as all pleading is construed against the pleader, it is clear that the mind of the court was not upon the character of the consent, whether express or implied, but upon assent to the man's being on the road, by agents of the company; for otherwise the omission to aver that the consent was express, and to set it out as such, would have been fatal to the declaration, and the demurrer would have been sustained. Besides, the judgment there is not put on the consent of the company as essential to the ruling; but in the opinion it is said in conclusion, not that the right of plaintiff turned on the consent of the company that he should be on its road, but the language is: "Especially must this be his right, when he was on the track by the consent of the defendant," as much as to say, he had a right to go to the jury on the allegations anyway, but the consent of the defendant rendered the right indubitable. True, consent is emphasized, because it put the point stronger and more irresistible; but without it, the declaration would have been held good.

Be that as it may, I hold in this case, as I did in that, that the plaintiff, under the facts, is not a mere trespasser, but is entitled to more consideration than a trespasser, that is, to all ordinary and reasonable care and diligence. It will be seen from that case that I wrote that a naked trespasser would be protected from gross negligence. The case cited from the 37th Ga. 593, where the point came squarely up, would seem to put even a naked trespasser upon the higher ground of ordinary diligence, that is to say, the liability which attaches to ordinary neglect. Code, § 2061. Gross neglect is quite a different thing. Code, § 2063. The one is the absence of the care of an inattentive man; the other of a prudent man.

I think that the unanimous decision in the 37th is the law rather than my obiter in the 60th. Code, § 217. See also *The Central R. R. v. Glass, Adm'x*, 60 Ga. 441, where a recovery was had because the conductor and engineer were not sufficiently diligent in looking out for Glass, who was lying drunk on the road a mile from the place where he was put off. There the court say: "Leaving out of view altogether the conduct of the conductor and brakeman (of the down train) in putting Glass off at the place and time they did so, the law presumes that the up train which did the damage was negligent, and there is, in our

judgment, no sufficient proof of diligence on the part of the officers of that train to rebut the presumption." So that Glass, a naked trespasser, recovered on the ground, not of gross negligence, but ordinary negligence.

This case at bar was here before. It is reported in 64 Ga. p. 475. The case was then sent back upon the law substantially as indicated above, and no intimation was made by the court that there could be possibly no recovery. On the contrary, on errors of law it was then remanded; on an error of law I now concur in again remanding it. The line of my brother's argument leads inevitably to the conclusion that, under the facts, there can be no recovery. It would have been the duty of this court to have so declared then, had it so thought; because it would have been a waste of time and of costs to have tried before a jury an issue which this court would not permit to stand if determined by that jury in a certain way. Having not so held, in common with my brethren then, I cannot so hold now; but I concur in the judgment that the case be tried again, because I think the court erred in giving, without qualification, the charge requested, content to abide the verdict of the jury on the issues of fact which may be again made before them.

I add that the court below may have charged the request because it was the language of this court in some case here; but what this court lays down as law is to be construed in the light of the facts of each case, and it will be found unsafe for counsel to copy from the reports an abstract principle of law, and request it to be charged, and for the court to charge as so requested. Besides, sometimes unguarded expressions of the individual member of this court writing the opinion may mislead, because those expressions needed qualification.

From the above it will be seen that the opinion of my brother, as a whole, is his own, and not that of the court; because but two of the court sat in final judgment of the case, and I cannot assent to many views of the law which he had expressed as applicable to and ruling and controlling the case at bar. This I say in entire respect for the learning and integrity which distinguish him as a lawyer and a judge.

**Duty of Railroad Company to Persons on Track Permissively.**—The mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon without any objection on the part of the railroad company does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers. *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. 579; *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 276; *Indiana, etc., R. Co. v. Hudelson*, 13 Ind. 325; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Gaynor v. Old Colony R. Co.*, 100 Mass. 508; *McLaren v. Indianapolis, etc., R. Co.*, 8 Am. & Eng. R.



R. Cas. 217; Yarnall v. St. Louis, K. C. & N. R. Co., 10 Am. & Eng. R. R. Cas. 726; Hogan v. Chicago, M. & St. P. R. Co., 15 Am. & Eng. R. R. Cas. 439.

**Duty of Railroad Company to Licensees on Track.**—When the railroad company has assented to such use of its right of way by the public or has expressly licensed it, its employees are bound to a greater measure of care in the operation of their trains. Harty v. Central, etc., R. Co., 42 N. Y. 468; Murphy v. Chicago, etc., R. Co., 45 Iowa, 661; Daley v. Norwich, etc., R. Co., 26 Conn. 591; Brown v. Hannibal & Mo. R. R. Co., 50 Mo. 461; Kansas, etc., R. Co. v. Painter, 9 Kans. 620; s. c., 14 Kans. 38; Illinois, etc., R. Co. v. Hammer, 72 Ill. 347; Donaldson v. Milwaukee, etc., R. Co., 21 Minn. 293; Sutton v. New York, etc., R. Co., 66 N. Y. 243; Davis v. Chicago & N. W. R. Co., 15 Am. & Eng. R. R. Cas. 424.

In some cases where a party has been guilty of negligence which, however, is not of such a character as to defeat the action, the circumstance will be taken into account in mitigation of damages. Gould v. McKenna, 86 Pa. St. 297; Matthews v. Warner's Adm'r, 29 Gratt. 578; Smith v. Nashville, etc., R. Co., 6 Heisk, 174; Hill v. Nashville, etc., R. Co., 9 Heisk, 523; Railroad Co. v. Walker, 11 Heisk, 383; Louisville & N. R. Co. v. Connor, 2 J. Baxt. 302; N. & C. R. Co. v. Smith, 6 J. Baxt. 174; s. c., 9 Lea (Tenn.), 470; s. c., 15 Am. & Eng. R. R. Cas. 469; East Tenn., Va. & Ga. R. R. Co. v. Humphreys, Adm'r, 12 Lea (Tenn.), 200; s. c., 15 Am. & Eng. R. R. Cas. 472.

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HOPPE, Adm'r, etc.,

v.

CHICAGO, M. AND ST. P. RY. CO.

(61 Wisconsin Reports, 357.)

Upon the evidence in this case, the question whether the killing of plaintiff's intestate was due to negligence of the defendant in running its train at an unlawful rate of speed within the limits of a city was properly submitted to the jury, and an affirmative finding in that behalf cannot be disturbed.

The evidence in this case—showing, among other things, that plaintiff's intestate, a boy, sixteen months old, whose parents were poor, had been left in charge of his brother, seven years old, while his mother went across the railroad track to milk her cow in a pasture; that a few minutes later the child was killed by a passing train upon the track, immediately opposite a hole in the fence through which the mother had gone; and that the mother knew that once, a few weeks before, the child had followed her upon the track through such hole in the fence—is *held* not to prove conclusively that negligence of the parents contributed to the death of the child. That question was therefore properly submitted to the jury.

Evidence that the railroad track, at the point where the child was killed, was considerably used as a foot-way by people residing in the vicinity, was admissible.

A non-expert witness may testify as to his estimate of the rate of speed at which a railroad train was moving, but such an estimate is very unsatisfactory proof and should be received with great caution.

The unconditional denial of a motion for a new trial is a bar to a second motion upon the same ground.

An order denying a new trial is reviewable on an appeal from the judgment, but this court is confined on such review to the record proper.

The form of a special verdict is largely in the discretion of the trial judge, and, if the questions submitted cover all the controverted issues of fact and are reasonably specific, this court will not interfere.

The trial judge may properly admonish the jury to make their answers to the several questions submitted for a special verdict consistent with one another.

Where a special verdict is found, a general verdict is unnecessary; but its rendition is not error, especially where it is merely a correct conclusion of law from the special findings.

Damages of \$1000, awarded for the killing of a healthy boy, sixteen months old, whose parents were poor and approaching middle life, are *held* not excessive.

APPEAL from Circuit Court, Dodge County.

On August 15, 1881, the plaintiff's intestate was run over and killed by a train of cars running on the railway of the defendant company, in the city of Watertown. The plaintiff has been duly appointed administrator of the estate of the deceased, and brings this action under the statute to recover damages for such killing, alleging that the same was caused by the negligence of the defendant's employees in charge of such train. The deceased was an infant, not quite sixteen months old, and the son of the plaintiff. At the time of the death of his son the plaintiff resided in the Fifth Ward of the city of Watertown, and occupied a piece of land containing about three acres. The defendant's railway, leading from Watertown to Portage City and La Crosse, passed in a northwest direction through such parcel of land, leaving about two acres thereof southwest of the railway and one acre northeast thereof. The plaintiff's residence was on the two-acre parcel, and the one acre was used by him as a pasture for his cow. The plaintiff is a laboring man and is poor. He was then in the employ of the railroad company. His family consisted of himself, his wife, and four children,—Gustave, Otto, Jules, and Emil, the deceased. He was about 38 years of age; his wife was 42; and the children were aged, respectively, about 12, 8, and 6 years, and 16 months. Fences had been theretofore erected and maintained by the defendant through the tract of land so occupied by the plaintiff. There was a hole in the fence on the southwest side of the track, caused by the absence of the two middle boards between two posts. It is about 20 rods from the plaintiff's house to this hole, and there was a well-beaten track between them. The plaintiff's wife was accustomed to use this path when she went to milk her cow, except in wet weather.

After the plaintiff and his family had eaten their supper on the evening of August 15, 1881, but while it was still full daylight, Mrs. Hoppe went across the railroad track to milk her cow, and the plaintiff went to the west side of his house and commenced sawing wood. Before Mrs. Hoppe left the house she directed

Gustave, the eldest child, to wash the supper dishes, and told Otto, the next eldest, to watch the baby, meaning the deceased. A very few minutes thereafter Emil was run over, immediately opposite the hole in the fence, and killed by a passing freight train running from Watertown to Portage City. The engineer of such train saw something on the track at the point where Emil was killed, when he was probably 80 to 100 rods distant therefrom, but supposed it to be a dog or some other animal. When he was within 12 or 15 car-lengths of the object—about 25 or 30 rods—he discovered it was a child. He promptly whistled for brakes, reversed his engine, sanded the track, and used every available means to stop the train. The train hands were at their proper posts and promptly applied the brakes. But the momentum of the train was such that although running up a grade, which the testimony tends to show was 46 feet to the mile, they did not succeed in stopping it until the locomotive and four or five cars had passed the point where Emil was struck. Twenty-six rods southeast of that point the railroad crosses a plank-road which the evidence shows was much travelled. There were other travelled streets or roads within the city limits north of the plank-road in the vicinity of and beyond the plaintiff's residence. The railroad track through plaintiff's premises and down to the plank-road was much used as a foot-way by persons residing in that vicinity.

It is in evidence that a few weeks before Emil was killed he went on the track at the same point, having followed his mother, who had gone to milk her cow. This fact was known to Mrs. Hoppe. The plaintiff had resided in the same place since the preceding April, and the train in question was a regular freight train, which passed the plaintiff's residence daily at nearly the same hour. The speed of the train which ran over Emil when it crossed the plank-road is variously estimated by the witnesses at from six to fifteen miles per hour.

The court overruled a motion for a nonsuit, and, on the demand of the defendant for a special verdict, submitted certain questions of fact to the jury, which, with the answers of the jury thereto, are as follows: "(1) Was the death of Emil Hoppe caused by the train of defendant on the fifteenth day of August, 1881? *Answer.* Yes. (2) At what rate of speed was the train running when it passed the whistling-post southeast of the Portland plank-road? *A.* At twelve miles per hour. (3) What was the average rate of speed of the train between the junction and the point where the engineer discovered that a child was on the track? *A.* Nine miles per hour. (4) Did the engineer and train-men do all that could have been done to stop the train and avoid the accident? *A.* No. (5) Prior to the accident were persons in the habit of travelling or passing along defendant's track between the junction and Bonner Street? *A.* Yes. (6) On the fifteenth day of August, 1881, was

there an opening in the fence at the point where the path leading from plaintiff's house crosses the fence? *A.* Yes. (7) If you answer that there was an opening, what kind of an opening was it, and how long had it existed? *A.* An opening from one post to another, with the exception of the top and bottom boards, which opening existed from November, 1880, and until after the accident. (8) Did the parents of the child know of or use said opening before August 15, 1881? *A.* Yes. (9) Was the death of Emil Hoppe occasioned by the negligence of the employees or servants of the defendant? *A.* Yes. (10) If you answer yes to the last question, of what negligence was defendant guilty? *A.* Of not fixing the fence at said opening, and also of not running the train slow enough within the limits of the city. (11) Was the death of Emil Hoppe occasioned in part by contributory negligence of his parents, or either of them? *A.* No. (12) Do you find for plaintiff or for the defendant? *A.* For the plaintiff. (13) If for the plaintiff, at what sum do you assess the damages? *A.* At one thousand dollars." The jury also found a general verdict for the plaintiff, assessing his damages at \$1000.

A motion was made for a new trial upon the alleged ground, *inter alia*, that counsel for the plaintiff had indulged in improper remarks in his closing address to the jury. The court denied this motion, and judgment was entered pursuant to the verdict. Counsel for the defendant afterwards moved the court upon affidavits to set aside the judgment and grant a new trial. This was denied. Such affidavits are returned with the record. They relate to the alleged improper remarks of counsel. This appeal is by the defendant from the judgment, and from the order denying the motion to set the same aside.

Harlow Pease for respondent.

John W. Cary and D. S. Wegg for appellant.

LYON, J.—The questions, whether the death of the plaintiff's intestate was caused by the negligence of the employees of the defendant company operating the train, and, if so, whether the parents of the deceased were guilty of negligence which contributed to his death, were submitted to the jury for their determination. The first question was answered by the jury in the affirmative, and the second in the negative. If they were properly thus submitted, the verdict supports the judgment for the plaintiff, and the judgment cannot be disturbed unless error in some other respect has intervened. The important, if not the controlling, questions to be now determined are, therefore: Does the evidence prove conclusively that the defendant was free from negligence? and, if not, does it prove conclusively that the plaintiff and his wife were guilty of any negligence contributing to the death of their child? The jury found the defendant guilty of negligence in not repairing

the opening in the fence on plaintiff's premises through which the child went on the railroad track, and because the train was running at too high a rate of speed. They also found that the train was running at the rate of twelve miles per hour when it passed the whistling-post before it reached the plank-road crossing, and that its average rate of speed between the junction and the point where the engineer discovered that a child was on the track was nine miles per hour.

1. The testimony bearing upon the rate of speed of the train will first be considered. The junction mentioned in the findings is understood to be something over 200 rods southeast of the plank-road. The distance of the whistling-post from the plank-road crossing is understood to about 40 rods. The grade of the road, from the junction to the place of accident, is unequal. The testimony tends to show that it varies from  $5\frac{1}{2}$  feet to 46 feet per mile. Only two witnesses estimated in miles the speed of the train. One Lounsbury, a witness for the plaintiff, who saw the train just as the signal for brakes was sounded, probably near the plank-road crossing, estimated its speed at that point at 15 miles per hour. The engineer of the train, a witness for the defendant, testified that he thought the train was running at the rate of about 6 miles an hour, from the time it started until it stopped, and that he was sure it was not running 15 miles an hour. Although no other witness estimated the speed of the train, there are many facts and circumstances, which the testimony tended to prove, that have an important bearing on the question. One of these is the fact that the train was moving on an ascending grade, and for that reason could doubtless be more readily stopped. Another is that after the child was discovered on the track, the engine reversed, and brakes signalled and applied, and after every possible effort had been made by the train-men to stop the train, the testimony tends to show that it must have moved, on this up-grade of 46 feet to the mile, a distance of 30 to 35 rods. We think it cannot be held as a matter of law that a train running not more than six miles an hour, on such a grade, could not be stopped in that distance, with all the efforts that were made to stop this train. Were this a question of law at all, we are strongly inclined to think that the opposite should be held. Another fact, testified to by the conductor of the train, is also significant. He says that he was standing in the caboose when the engine was reversed, and it threw him head-first—sent him to the other end of the car. This, and other facts and circumstances which the testimony tends to prove, pertain to or constitute the *res gestæ* from which, as well as from the estimates of witnesses, the inference of negligence, or the absence of it on the part of the defendant, is to be deduced. To draw such inference is peculiarly the function of the jury, as this court has held in many cases. See *Sutton v. Wauwatosa*, 29 Wis. 21; *Ken-*

worthy *v.* Ironton, 41 Wis. 647; Bohan *v.* Milwaukee, L. S. & W. Ry. Co., 58 Wis. 30; s. c., 15 Am. & Eng. R. R. Cas., 374, and cases therein cited. It should be remarked, in this connection, that the estimate of a witness, especially of a non-expert, of the rate of speed of a moving railway train, is very unsatisfactory proof, and should be received with great caution. If the res gestæ renders it impossible, or even highly improbable, that the estimate can be or is correct, it should be rejected.

It is conclusively proved that the railway track, from the junction to the place of the accident, was within the corporate limits of the city of Watertown; that, at least, until the train passed the plank-road, it crossed travelled streets; and the evidence tends to show that it had not passed all the travelled streets in that city, crossed by the track, when Emil was killed. Hence, any rate of speed exceeding six miles per hour, at or near the place of the accident, was unlawful (Rev. St. p. 1043, § 4393), and if such unlawful rate of speed contributed to the death of Emil it was negligence.

Our conclusion is that the question, whether the death of the boy was caused by the negligence of the defendant in running its train at an unlawful speed, was properly submitted to the jury, and that their finding in that behalf cannot be disturbed. This conclusion renders it quite unnecessary to consider the question of the defendant's alleged negligence in not repairing the fence through which the deceased went upon the railroad track.

2. We are next to determine whether the evidence proves conclusively that the negligence of the plaintiff or his wife contributed directly to the death of Emil. The facts upon which this question is to be determined are not numerous or complex. The mother of Emil knew that he had once, a few weeks before his death, gone upon the railway track through the hole in the fence. Under what circumstances he went there does not appear. They might have been such as not to show that he was liable to repeat the act. At any rate, it does not appear that he did repeat it until the time he was killed, although several weeks had elapsed. However, it may be conceded that the fact of his once going there to her knowledge laid upon his mother an obligation of increased diligence to keep him off the track. When she went to milk her cow on the evening Emil was killed, she left him in charge of his elder brother Otto, then seven years of age. Some consideration is due to the fact that the family were poor, and it was doubtless necessary, in carrying on their domestic affairs, that the services of each member of the family should be fully utilized. The labor of children of tender years is often valuable and necessary in such a family, and such children often acquire efficiency and discretion beyond their years. The testimony does not show the capacity of Otto in these respects. That is left to inference, to be drawn (if



at all) from the condition and circumstances of the family. If Otto had sufficient judgment and discretion to watch and care for Emil during the temporary absence of his mother from the house, or if she had reason to believe that he had, negligence cannot be imputed to her for leaving the child in his charge. Whether she had reason so to believe or not was peculiarly a question for the jury to determine, upon due consideration of all the testimony bearing upon it. So, also, was the question whether the exercise of due care did not require the plaintiff to stop the hole in the fence. It must be held that negligence on the part of the parents of Emil, or either of them, contributing to his death, was not conclusively established by the evidence, and hence that the question of their negligence was properly submitted to the jury.

3. This appeal is not only from the judgment, but from an order denying a motion to vacate the same, and for a new trial, made after the judgment had been entered. The motion was made at a subsequent term, and was founded upon affidavits showing that the counsel for the plaintiff made certain remarks in his closing argument to the jury which it is alleged were improper. A motion on the minutes for a new trial had been made at the trial term and denied. This motion was founded in part upon the same ground; that is, upon alleged improper remarks by such counsel to the jury. The motion was denied unconditionally, and no leave was given or asked to renew it. This was a complete bar to the second motion, and the same was properly denied. *Branger v. Buttrick*, 28 Wis. 450; *Moll v. Benckler*, Id. 611. The first order denying the motion for a new trial is reviewable on the appeal from the judgment. Rev. St. p. 799, § 3070. In reviewing the same, however, this court is confined to the record proper, and cannot look into the affidavits upon which the second motion was founded, for these form no part of the record. Looking into the bill of exceptions, we find a very few disconnected remarks of counsel preserved therein, and as soon as objection was made thereto the court promptly interposed and required counsel to confine himself to legitimate argument. The record discloses nothing in this respect which could operate to the prejudice of the defendant.

4. A special verdict was demanded on behalf of the defendant, and its counsel proposed 23 questions to be submitted to the jury. The court prepared and submitted to the jury the questions contained in the above statement of the case, five of which were proposed by such counsel. None of the remaining questions were submitted in the form proposed; some of them were not submitted in substance. For this omission error is assigned. It is unnecessary to state or discuss these questions in detail. It is quite sufficient to say that we think the questions proposed cover and include all the controverted issues of fact in the case, and that they



are reasonably specific. The form of a special verdict is very largely in the discretion of the trial judge, and we find in this case no failure by him to exercise such discretion properly and wisely.

5. Neither do we find any error, of which the defendant can be heard to complain, in the charge of the judge, or in his refusal to give certain instructions asked in behalf of the defendant. A point is made against the charge because the jury were admonished to make their answers to the several questions submitted to them consistent, one with another. The reports of numerous cases in this court, in which judgments have been reversed because the special findings were not consistent with each other, show that the admonition was not ill advised. It certainly cannot be error to direct a jury to do a certain thing, when the judgment based upon their verdict would be reversed were they to disobey the direction. The instructions asked fill six pages of the printed case. They were not given in the form proposed. Those which relate to the negligence of the defendant in not keeping the fence in repair have ceased to be of any importance in the case, for reasons already stated. The substance of the others, in so far as applicable to the specific questions submitted to the jury, and in so far as they correctly stated the law, were sufficiently contained in the general charge, which contains a clear, accurate, and sufficiently comprehensive statement of the law of negligence applicable to the case.

6. *First.* It was not error to allow proof that the railway track, through the premises occupied by the plaintiff, was considerably used as a foot-way by people residing in that vicinity. It pertains to the *res gestæ*. But the evidence is of little importance. Strike out the special finding on that subject and the plaintiff would still be entitled to judgment. *Second.* Neither was it error to allow the witness Lounsbury to estimate the speed of the train. It is not required that a person must be an expert before he can be allowed to testify to the speed of a railway train, a horse, or any other moving object.

7. The damages are not so excessive (if they are excessive) as to justify the interference of this court. It appears that Emil was a healthy child, and had walked for six months before he was killed. Expectations that he would live to reach manhood, and would be of substantial pecuniary benefit to his parents, were not unreasonable. Besides, his parents were poor and were approaching middle life. These are all elements to be considered in assessing damages in such a case. Having due regard to them, we cannot say that they have not suffered by the death of their child a pecuniary loss of \$1000.

8. Although a general verdict was unnecessary, it was not error that one was found. The general verdict is merely a correct con-

clusion of law from the special findings, and it neither benefited nor harmed either party.

Our conclusion upon the whole case is that the record discloses no material error against the defendant, and hence that the judgment of the circuit court cannot lawfully be disturbed. Judgment affirmed.

**Children Escaping from Control of Parents.**—When a child escapes from the control of a parent and makes its way upon a railroad track and is killed or injured, it is generally a question for the jury whether or not the parent has been guilty of such contributory negligence as will preclude recovery. *Pittsburg, etc., R. Co. v. Pearson*, 72 Pa. St. 169; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Bahrenburg v. Brooklyn City R. Co.*, 56 N. Y. 652; *Prendegast v. New York, etc., R. Co.*, 58 N. Y. 652; *Falcon v. Central Park, etc., R. Co.*, 64 N. Y. 13; *In re Hagan's Petition*, 7 Cent. L. J. 311; *Smith v. Atchison, T. & S. F. R. Co.*, 4 Am. & Eng. R. R. Cas. 554; *St. Louis, I. Mt. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. R. Cas. 608; *Johnson v. Chicago & N. Y. R. Co.*, 8 Am. & Eng. R. R. Cas. 471; *Frick v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. R. Cas. 776; *O'Connor v. Boston & L. R. Co.*, 15 Am. & Eng. R. R. Cas. 362; *Williams v. Texas, etc., R. Co.*, 15 Am. & Eng. R. R. Cas. 403; *McGeary v. Eastern R. C.*, 15 Am. & Eng. R. R. Cas. 407.

**Duty of Railroad Company Licensing Public to Use Track.**—When a railroad company has expressly permitted the public to use its right of way at a certain place as a foot-path, its employees are bound to take greater care in the operation of their trains at that point. *Daley v. Norwich, etc., R. Co.*, 26 Conn. 591; *Harty v. Central, etc., R. Co.*, 42 N. Y. 468; *Illinois, etc., R. Co. v. Hammond*, 72 Ill. 347; *Kansas, etc., R. Co. v. Pointer*, 9 Kans. 620; s. c., 14 Kans. 33; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; *Brown v. Hannibal & Mo. R. R. Co.*, 50 Mo. 461; *Sutton v. New York, etc., R. Co.*, 66 N. Y. 243; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 293; *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. R. Cas. 424.

**Duty of Railroad Company when Public Use Track as Foot-path without Objection.**—But a mere permissive use of the track by the public without objection on the part of the railroad company does not alter the company's measure of duty. *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Indiana, etc., R. Co. v. Hudelson*, 13 Ind. 325; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 276; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 475; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Gaynor v. Old Colony R. Co.*, 100 Mass. 508; *McLaren v. Indianapolis, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 217; *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. R. Cas. 726; *Hogan v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. R. Cas. 439.

**Opinion Evidence as to Speed of Train.**—When the question at issue is the speed at which a train has been propelled, opinion evidence is clearly admissible. *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512; s. c., 8 Am. & Eng. R. R. Cas. 225; *Pennsylvania Coal Co. v. Conlan*, 6 Am. & Eng. R. R. Cas. 243.

But see *Manhattan, etc., R. Co. v. Stewart*, 13 Am. & Eng. R. R. Cas. 503.

BALTIMORE AND OHIO R. R. Co.

v.

STATE OF MARYLAND, to use of Allison, etc.

(*Advance Case, Maryland. 1884.*)

An action being brought by the State to the use of another against a railroad company for causing the death of a certain party, the narr subsequently filed by mistake omitted the name of the State. *Held*, that the narr might be so amended as to conform to the original titling of the action.

In an action for running over and killing a person walking upon the track, a switchman was held competent to testify as to statements made to him by the engineer of the train causing the accident, to the effect that a man had been run over and killed, it being a part of said engineer's business to inform the switchman of any obstruction on the track, so that he might hold back the following trains until the obstruction was removed. Said switchman was, however, incompetent to testify as to declarations made to him by the engineer as to the manner of killing and the identity of the person killed. Such evidence was obnoxious as hearsay evidence.

A right of way of a railroad company is the exclusive property of such company upon which no unauthorized person has a right to be. Any one who travels upon such right of way as a footway and not for any business with the railroad is a wrong-doer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use the track or create any obligation for a special protection.

A city ordinance requiring a man to be posted on the front of a locomotive within municipal limits, regulating the rate of speed, and requiring a bell to be rung when approaching cross streets, is not applicable where the engine is running at night in a part of the city where there are no streets, which is swampy and uneven, and where there are no lights.

A party who was drunk undertook to walk at night along a railroad track at a place where it ran along a high embankment in a swampy and uninhabited tract within the limits of a city. He was run over and killed by a passing train. The evidence tended to show that he was lying down on the track when struck. The negligence alleged consisted of a failure to observe the regulations prescribed by the municipal ordinance above referred to. *Held*, that the provisions of the ordinance were inapplicable, that there was no evidence of negligence to submit to a jury, and that judgment should be entered for the railroad company defendant.

THE opinion states the facts.

John K. Cowen for plaintiff in error.

John S. Yellott, R. R. Boarman, and John K. Shott for defendant in error.

IRVING J.—The motion to dismiss this appeal must be overruled. It is apparent from the proofs submitted that the delay in the transmission of the record was not occasioned by any fault of the appellant, but was the fault of the clerk, who so admits on oath. On the night of the 9th of July, 1881, William J. Allison, the

father of the equitable plaintiff, is alleged to have been killed by a train of the appellant's railroad cars passing over him; and this suit is brought in the name of the State for the use of his only child to recover damages for the death of the father, by the negligence of the defendant's employees.

The first exception is to the allowance of an amendment to the plaintiffs' narr and titling to it. The theory of the exception is that an entirely new party has been admitted contrary to the provisions of Section 29 of Article 75 of the Code. But this is a clear misapprehension. By examining the record we find the suit was brought by titling in the name of the State, use of Grace M. Allison, by her next friend, Catharine Butry. When the declaration came to be filed, in the titling thereto, and in the commencement thereof the name of the State was omitted and the leave asked was not to amend the titling to the suit; but that of the declaration itself, and the declaration also. The granting of this motion allowed the plaintiff to do no more than make the declaration conform to the original titling and the summons which issued in pursuance of it; and was entirely justified by the 23d Section of Article 75 of the Code, and the uniform practice which has obtained thereunder. There was therefore no error in that regard.

The second bill of exceptions presents a question of the admissibility of a certain statement of the engineer alleged to have been made to the switchman immediately after the accident. Procton, the witness, was flagman and switch-tender for the appellant at the time of the accident at the watchbox, on the appellant's road, where it curves off from the main road and runs down across Fort Avenue to the appellant's coal hopper yard.

The witness said it was the engineer's business to inform him of any obstructions that might be on the track, so that he might hold the following train till the obstruction was removed. He stated that the engineer told him there was a man killed down on the track. To this no objection was made, it being conceded to be within the line of the engineer's duty to state that much. The plaintiff then asked, "What was the communication made to you by the engineer, Davis, when he came back, as to how the man was killed?" Objection was made to this question, but it was overruled, and exception was taken. The statement made and allowed was, that in response to a question from witness, "What kind of looking man he was," he responded, described the man, and said "he had pulled the whole train over him." We are at a loss to perceive upon what principle this question and answer can be admitted. The fact that there was a man killed on the track was all that the watchman need know for the discharge of his duty in preventing another train from going down the track. How it was done was immaterial so far as his duty was concerned; and as

proof in the cause, nothing that the engineer stated to witness, beyond the fact that there was a man killed and on the track, ought to have been admitted, for it was clearly hearsay. How it was done the Court recognized as inadmissible, and refused to let the witness proceed with any further detail. We cannot see why what he did say was less objectionable than further particularity in respect to the matter. It was not offered to impeach the engineer, whose testimony was not then in as a contradictory statement; and it was error to permit the witness to say more than that a man had been killed and was still on the track. It is so clearly obnoxious to the objection of being hearsay, that we need not cite authority in support of this ruling.

The third exception is to the refusal of the Court to take the case from the jury by granting the defendant's prayer to that effect, offered at the close of the plaintiff's testimony. As this prayer was renewed after the defendant's testimony was all in, and was again refused, and exception was taken to that refusal and the granting of certain instructions on the behalf of the plaintiff as well as the rejection of others on the part of the defendant, all of which is presented by the fourth exception, we shall consider that question in the light of the whole case as presented by the proof embodied in all the exceptions.

The main facts which need recital are undisputed or uncontradicted. At a point in the city of Baltimore where the appellant's road forks, and one track, called the New York cut-off, goes on to the ferry, and the other track curves off and runs down to the appellant's coal hopper yards, there is a watchbox, where the defendant keeps a watchman, or a switch-tender. From this point to the hopper yards of the appellant, the appellant's road was on its own private property, condemned and purchased for the purposes of its road. Although it passes through the city, that portion of the road where the accident occurred passed through an uninhabited and unbuilt-up portion of the city, where there are and were no streets, opened and used as such. Streets are laid down on Poppleton's plat, to be opened whenever the needs of the city require it, because of expansion in that direction; but as yet it is uninhabited, and no streets have been condemned or opened. Fort Avenue is a public highway and quite a travelled thoroughfare.

This track crosses Fort Avenue in its route to the hopper yards about four hundred and fifty yards from the watchbox, on Mills Street. The accident happened about three hundred yards from Fort Avenue and about one hundred and fifty yards from the watchbox. From the watchbox the hopper tracks curve off to the left, from the main road, and the track runs upon a "high fill," fifteen or twenty feet high, through a swamp called the "Devil's Bucket," into which the roadbed slopes steeply on each side. This embankment extends nearly to Fort Avenue. Persons can walk

along the side of the track, but cannot ride or drive along it. Some people use it in the daytime as a pathway down to Fort Avenue, but it was never so used at night. Although the track is laid on a high fill, the road is down grade towards Fort Avenue. At the point where the accident occurred no street is projected for the future, even. There are two hopper tracks, and before reaching Fort Avenue the engine was usually switched off, and, running back on the other track to the watchbox, got on the other track again to push the cars to the hopper yard. About twenty-five minutes past 1 o'clock A. M., on this occasion, the appellant's engine, with tender and twelve loaded coal cars, passed the watchbox and went down towards Fort Avenue. The train went down on the south track and the engine came back in from three to five minutes on the other track, and then the engineer informed the watchman that a man was killed on the track. The train was moving, two, three or four miles an hour. No bell seems to have been rung in passing the watchbox, but the headlight was burning all right. How the deceased came to be there, or when he came, no one could tell. A drunken man had been seen an hour or more before down the track going in that direction and towards the watchbox. Although shown to be ordinarily sober and opposed to drinking, even to total abstinence, there was uncontradicted evidence from two persons that he was drunk that night, and left a drinking house with a flask of liquor, and there was proof that the smell of liquor was plain, three feet off before reaching his body. He was nearly a mile away from his boarding house without any explanation of it. There were no habitations anywhere near by. Though within the city limits, there were no streets, nor lights from the watchbox to Fort Avenue. The place was dark and lonely, and the ground uneven and rough.

It would seem as if the man was lying on the track at the moment of the accident, either drunk, or asleep, or sick, possibly already dead; for the fireman, who was on the lookout, saw something, as he thought, and said to the engineer, who was also on the lookout, "Si, what's that; is it a hog?" and in the same breath and before the engineer had time to do anything, though he had his hands on the throttle, the fireman said, "No, it is nothing; go ahead." The engineer said nothing and made no effort to stop, and did not stop, but kept on till the engine was cut loose and came back on the other track. When he got opposite the rear end of the train, he was told by the conductor, they had run over a man. They had felt no jar as having passed over anything, and had heard nothing.

Upon this state of facts the appellees wholly relied for recovery upon alleged violations of the following ordinance of the city, which was put in evidence: "When a locomotive engine is used within the limits of the city, a man shall be required to ride on the



front of the locomotive engine when going forward, and when going backward on the tender, not more than twelve inches from the bed of the road; nor shall any locomotive be propelled at a greater speed than five miles per hour except when there are grades requiring greater speed, and then it shall not exceed six miles per hour; and the person or persons having charge of such locomotive engine shall ring a bell when approaching any and every cross street, and no steam whistle attached to any locomotive engine shall be used within the limits of the city, except at the Mount Clare and Camden stations and between said stations of the city limits; and for any violation of the condition herein set forth the company so violating shall forfeit and pay the sum of ten dollars for each and every offence."

It is claimed on the part of the appellee that this ordinance was violated in not having a person to ride in front of the engine within twelve inches of the ground to look out and prevent accidents. It has already been shown that there was no bell rung, but as the ordinance only requires that to be done at the approach of street crossings, and there were no cross streets where this accident occurred, and they were not near enough to Fort Avenue to require the bell-ringing to be begun for it, that can hardly be pressed as a sufficient omission to be of itself a cause of action in this case. Indeed, it was not seriously insisted that it was.

To avail themselves of the confessed omission to do what the ordinance required of the railroad company in respect to the look-out in passing through the city, the appellee's counsel argued that notwithstanding this was the private right of way of the appellant, yet there was a path along the track, and people were in the habit of using it for the purpose of passing down to and from Fort Avenue and beyond, so that it had become such a thoroughfare that the company, in the use of its right of way for its engines and cars, were under obligation so to use it with special reference to this use by the public, and to exercise special caution in passing down the road to avoid injuring any one happening to be on the track.

In reply the appellant contends that from the mere permissive user of the path of the side of the track the public has acquired no right to use it, and when there is no right there can be no obligation beyond that which ordinarily attaches to the use of engines and trains upon the appellant's private property: and this would seem to be accepted law by the large weight of authority. The mere user of such a path for foot passage, without the objection on the part of the company, cannot be construed into an invitation to so use it. And the use of such a perilous way of travel in the daytime could hardly justify an expectation that anybody would be so foolhardy as to attempt it at night—at which time the evidence is it was never used in that way.



A right of way of a railroad company is the exclusive property of such company upon which no unauthorized person has a right to be; and any one who travels upon such right of way as a footway, and not for any business with the railroad, is a wrong-doer and a trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use or create any obligation for a special protection. *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500. Whenever persons undertake to use a railroad in such case as a footway they are supposed to do so with a full understanding of its dangers and as assuming the risk of all its perils. *McLauren v. Indianapolis & Vincennes R. R. Co.*, 8 Am. & Eng. R. R. Cas. 219; *Jeffersonville, Madison & Indianapolis R. R. Co. v. Goldsmith*, 47 Ind. 43; *Railroad Co. v. Houston*, 95 U. S. 702; *Railroad Co. v. Jones*, 95 U. S. 442; 1 Thompson on Negligence, 453, 549; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 327.

In *Maener v. Carrol*, 46 Md. 212, which was a suit for injury received by falling into an excavation which had been dug in the private property of the defendant, over which people were in the habit of passing, but which was not a public highway, this court declared the same principles as controlling and adopting the language of the court in *Homsel v. Smith*, 7 C. B. (N. S.) 731, that in such case "One who uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and it may be perils." *Bricks v. South York & River Dan. Co.*, 3 B. & S., 244; *Bolch v. Smith*, 6 H. & N. 736; and *Gontrel v. Egerton*, L. R. 2 Q. B. 371, are cited in support of the law thus indorsed.

Inasmuch, therefore, as the presence of the deceased upon the road of the appellant at that point was a trespass, it would seem to be necessary to show some negligence, amounting to the omission of a general imperative duty towards him notwithstanding, which ought to subject the appellant to liability in the action brought. This the appellees think they find in the violation of the city ordinance with respect to the step and lookout provided for in it. To this appellant makes several replies: first, that there is an entire failure of proof to show that this omission tended in the slightest degree to bring about the fatal accident, or that its observance would have tended to prevent it; secondly, that the fact of the deceased being in so perilous a place without any assignable reason, and that, too, as a trespasser, at a most unreasonable hour, was such patently contributory negligence as entitled the case to be taken from the jury; and lastly, that the ordinance is so manifestly unreasonable that it cannot be complied with as engines are now constructed, the engine then used by the appellant being such as is now generally in use, and as the step did not exist and could not be placed, and a person could not sit where the ordinance provided

without imminent danger to life, the ordinance must be held inapplicable and void.

We are clearly of opinion that this case ought not to have been submitted to the jury. How the accident occurred and why is shrouded in as much mystery as it was in Burn's case, 54 Md. 113, and Barnard's case, 60 Md. 555; and to hold the appellant liable under the circumstances of this case, simply because of the ordinance in question and the alleged violation thereof in having no step in front of the engine within twelve inches of the ground, and in having no man there to look out and guard against accidents, would be giving an unreasonable interpretation and operation to the ordinance in question.

We do not find it necessary to consider or pass upon the question whether the ordinance has served its purpose, having been passed at a period when engines of different pattern were made and used, which have been superseded by others of such character that the ordinance cannot be complied with without endangering instead of protecting human life, and is consequently to be pronounced void because it is unreasonable. The question was very ably argued, and involves principles of great moment which we do not think ought to be decided without more proof bearing on the subject than we have in this case. We have no difficulty, however, in holding that the provisions of that ordinance ought not to be applied to a case circumstanced as this is and to a locality such as that where this road runs and the accident occurred confessedly is. The ordinance was intended for the protection of the people in the city who were compelled to pass along and cross streets where railroad cars were passing. It provides for the ringing of bells at the cross streets. It contemplated and was passed with reference to a condition of things which did not exist here. It presupposed that where the city was built up and populous, the passing and repassing would be so considerable as to require protection to life by means of such an ordinance. Although the locus in quo where this accident occurred was technically within the corporate limits of the city, practically it was outside; as much so as the country adjoining the corporate limits, and perhaps more so than most of the adjacent territory. It has already been described. It was not treated as part of the city by its authorities. It had no streets. It was uninhabited and desolate. It was swampy and uneven. It was not lighted nor patrolled. And there was no need for either lights or watchman. The railroad was running on its own private property, crossing none of the city streets at that point. Nobody was entitled of right to pass that way, and could not be expected to be passing at such an hour of the night. There being no reason or necessity for observing such precautions as those prescribed by the ordinance in such a place, it would be giving it a most unreasonable construction and unnatural application to hold

that an omission to observe its requirements at such time and place per se, and standing on that alone, gave a right of action to the appellee. This view is entirely sustained by authority, and we refer to 1 Dillon on Municipal Corporations, section 319; *Myers v. Chicago, Rock Island & Pacific R. R. Co.*, 59 Iowa, 556, and authorities there cited.

The facts bearing upon the ordinance and controlling the decision in *Myers's* case, 59th Iowa, are very similar to this case. Independent of the ordinance the case falls within the principles and ruling in *Burn's* case and *Barnard's* case, already cited, and as we think the ordinance cannot be invoked to control a verdict for the plaintiff, it is clear the prayer at the close of the case taking the case from the jury ought to have been granted. We are accordingly relieved from considering the other instructions.

Judgment reversed.

**Uses of Track as Foot path.**—The mere fact that persons living in the vicinity of a railroad have become accustomed to use its track as a foot-path, and have done so without objection on the part of the company, does not change the relative rights and obligations of the public and the company. *Bancroft v. Boston, etc., R. Co.*, 97 Mass. 276; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Illinois, etc., R. Co. v. Godfrey*, 71 Ill. 500; *Illinois, etc., R. Co. v. Hetherington*, 83 Ill. 510; *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. 579; *Yarnall v. St. L., K. C. & N. R. Co.*, 10 Am. & Eng. R. R. Cas. 726; *Nicholson v. Erie R. Co.*, 41 N. Y. 526; *Matze v. N. Y. Central, etc., R. Co.*, 1 Hun (N. Y.), 417.

But see *Indianapolis & St. L. R. Co. v. Galbreath*, 63 Ill. 436.

**When User is with Permission of Company Greater Measure of Care on its Part is Required.**—But when the track has come thus to be used as a foot-path with the permission of the company, the duty of the servants of the company is enhanced to so run their trains at that point as not to injure parties upon the track. *Harty v. Central, etc., R. Co.*, 42 N. Y. 468; *Murphy v. Chicago, etc., R. Co.*, 45 Iowa, 661; s. c. 38 Iowa, 539; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; *Pennsylvania R. R. Co. v. Lewis*, 79 Pa. St. 33; *Illinois, etc., R. Co. v. Hammer*, 72 Ill. 347; *Daley v. Norwich, etc., R. Co.*, 26 Conn. 591; *Brown v. Hannibal & St. Jo R. Co.*, 50 Mo. 461; *Sutton v. New York, etc., R. Co.*, 66 N. Y. 243; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 293; *Kansas, etc., R. Co. v. Painter*, 9 Kans. 620; *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. R. Cas. 424.

**Municipal Ordinances as to Speed Inapplicable in Suburban Parts.**—Municipal corporations have a right to regulate the running of trains within their limits by suitable ordinances, but such ordinances must be reasonable in order to be valid. Great diminution in speed or other extravagant precautions cannot be required outside the built-up portion of the city. *Meyers v. Chicago, R. I. & P. R. Co.*, 57 Iowa, 555; s. c., 7 Am. & Eng. R. Cas. 406.

KEYSER

v.

CHICAGO AND G. T. RY. CO.

(*Advance Case, Michigan. May 6, 1885.*)

Where a child two and a half years of age strays upon a railroad track, and, lying down thereon, is mistaken for a log of wood by the engineer and fireman when the train is 3000 yards distant and could readily be stopped, it is their duty to slacken the speed of the train, and avoid injuring the child, and if they fail to do so, the company will be liable for any injury inflicted.

In an action for negligently running over a child on its track, it may be shown that the railroad company failed to fence its tracks as required by the statute.

Whether the parents were negligent in this case was properly a question for the jury.

ERROR to St. Clair.

James L. Coe and Stevenson & Phillips for plaintiff and appellant.

E. W. Meddaugh for defendant.

SHERWOOD, J.—The plaintiff in this case is an infant, and was about two years and six months old when he received the injuries complained of. On the twenty-ninth day of July, 1880, the defendant ran one of its passenger trains, composed of an engine and four cars, going east over its track through the township of Kimball, in the county of St. Clair. The plaintiff and his parents lived on section 10 in Kimball, and about 20 rods south of the railway, on a private way, which was then generally used, and which crossed the railroad. The company's track was unfenced, and the crossings not supplied with cattle-guards. The father and next friend of the plaintiff were at home but little, and worked at Port Huron. His family consisted of his wife and three children—an infant, the plaintiff, and a young girl about five years old. On the day above-named the mother went to the garden some distance from the house to get vegetables for the family's dinner, leaving the two younger children at the house in charge of the girl, and during her absence the plaintiff wandered away upon the defendant's track, to the distance of a half or three quarters of a mile from the house, when the train came along, running at a speed of 30 or 35 miles per hour, and struck the plaintiff, threw him off the track into a log heap 20 or 30 feet distant, producing very serious and permanent injury to him. The train hands, not being able to ascertain where or to whom the child belonged, took him on board

the train and carried him to Port Huron. For the injuries thus received this suit was brought.

The negligence relied upon by plaintiff for a recovery against the defendant was—First, the company ran its train at too high rate of speed, and failed to keep proper lookout; second, it failed to fence the road as required by statute; third, it did not ring the bell or sound the whistle at the highway crossing. The defendant denied all negligence upon its part; denied that it was required to fence its road against the plaintiff; and claims the parents were guilty of contributory negligence in allowing so young a child as the plaintiff to go upon the defendant's track. Upon the testimony given, and under the charge of the court, a verdict was obtained by the defendant. After a careful review of the case and the rulings of the court, we do not think the judgment in this case can be sustained.

Upon the first point it appears that the country at the place and in the vicinity of where the accident occurred was somewhat low and wet, and grown up to brush and berry bushes, and though sparsely settled, was occasionally visited by persons in the vicinity, and others who gathered berries. There were two road crossings within three quarters of a mile of where the plaintiff was struck by the train. The engineer of the train was sworn on behalf of defendant, and gave evidence tending to show that the train was running at the rate of 30 or 35 miles per hour; that, with the number of cars composing the train, it could not be stopped in a less distance than from four to five hundred feet; that when he first saw the plaintiff upon the track his engine was from 3000 feet to 2500 feet from him, and he resembled a stick of wood lying upon the track; that he was lying down; that when he first discovered that it was a child which he saw his engine was about 1200 feet from the plaintiff.

The court charged the jury upon this point, among other things, that "at the point where the accident occurred there was no house in the immediate vicinity of the track, but it was swampy, unoccupied land on either side of the road, and not a place frequented by children, nor mere infants of the tender age of this one might reasonably be expected to stroll upon the track; and there is nothing in evidence warranting the assumption that employees of the defendant were required to keep a vigilant lookout in this locality. . . . The law does not require danger-signals to be given, except at public crossings or places frequented by persons, or where they may be expected to be, and no one, whether young or old, has a right to walk along the railroad track, or use it as a highway, and if he does so, he must take the consequences of his acts. . . . The only question that is left for you to consider and determine is whether the engineer and fireman in charge of the engine that struck this child, after they discovered him and realized the fact

that he was of that age that he was possibly helpless to take care of himself and get off from the track, did all that an ordinary, prudent, and careful engineer and fireman should have done under the circumstances, warning the child of his danger and stopping the train, and thereby avoid, if possible, killing or injuring him."

Upon the facts appearing upon this record, and which are undisputed, the law as laid down in these several charges was not correct. It is apparent from the record that something made its appearance upon the track, indicating danger a long way ahead of the train, and evidently in a locality where it would least be expected. It was discovered by both the engineer and the fireman. The occurrence was of a character to call for increased vigilance on the part of defendant's train-men in determining the character of the apparent obstruction. It should have, at least, caused the engineer to slow down the speed of his engine to such a rate that, in approaching it, he could have stopped his train, if necessary, to prevent injury before reaching the object of danger. The safety of the passengers, as well as that of the plaintiff, under all the circumstances, I think, required this to be done.

The evidence also presents a case where a sharp lookout was required and should have been kept by the employees on the train. I do not think that an infant boy, only two years and six months old, walking or lying down upon the track of a railroad, becomes a trespasser to the extent of subjecting himself, without the right of redress, to the recklessness or negligent acts or omission of the defendant, by which he is deprived of his health, his limbs, or his life. Under all the circumstances stated in the record, I do not think that such a lookout as was called for by the appearance of the child upon the track was observed by the train-men, nor that the plaintiff is "compelled to submit" to consequences so serious as those appearing in this case, because he strayed upon the defendant's track, when the injury could have apparently been avoided by proper care and caution exercised by defendant's engineer; neither do I think such care and caution was shown upon the part of the defendant. The charge was misleading upon this point, and prejudicially so to the defendant.

The next subject claiming attention is that relating to fences. Was the omission of the company to fence its track proper matter to be taken into consideration by the jury upon the subject of negligence on the part of defendant? I think it was, and that the question was substantially settled in this court in the case of *Marcott v. Marquette, H. & O. R. Co.*, 47 Mich. 9; s. c., 4 Am & Eng. R. R. Cas. 548. In that case this court, in speaking of the requirement to fence the track, said the propriety of fencing "is explicitly declared (in the statute), and the company required to use diligence not to incur risks from the want of it." And again, when the same case was before this court (49 Mich. 99; s. c., 8



Am & Eng. R. R. Cas. 306) it held that a charge to the jury to the effect "that if a construction of a fence at the place of injury would have prevented the accident and saved the child, then it was negligent in defendant not to have had a fence there," was eminently fair, referring to the charge requested by plaintiff's counsel.

The object of the statute requiring the company to fence its track was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the neglect of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributed to him in going where he did, or in doing what he did.

The statute requires the defendant to fence its road with a good fence, four and one half feet high. It seems to me that it cannot be successfully contended that such a fence would not have been a very formidable obstruction to the child's going upon the defendant's right of way. It may have been sufficient to prevent his going there entirely, and, if so, evidence of the negligence of the company to place the fence there was competent and material.

Counsel for plaintiff requested the court to charge the jury that "by the statute it is made the duty of the railroad company to fence both sides of its track, and if, for want of proper fences, injury results to a child, it was negligence on the part of the company to fail so to fence." This the court refused, and charged the jury: "In this case you will not consider any evidence in regard to the fact that there was no fence upon the sides of the defendant's railroad." I think the charge thus given, as well as the refusal of the court to charge as requested, were both erroneous.

The question of the parents' negligence in this case, under the circumstances, was one for the jury, and therefore needs no further attention. Neither is it necessary to consider the third ground of negligence relied upon by plaintiff's counsel.

For the errors herein stated I think the judgment should be reversed, and a new trial granted.

**Persons Lying on Track.**—Upon the question of the duty of the railroad company to such persons see note to *Louisville & Nashville R. R. Co. v. Greene's Adm'r*, *infra*.

**Fence Laws Applicable in Case of Injury to Cattle only.**—The fence laws are generally held applicable only in cases where cattle are killed or injured. They are ordinarily held to have no relation to cases of injuries to children. *L'Anglois v. Buffalo, etc., R. Co.*, 19 Barb. 364; *Fitzgerald v. St. Paul, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 310; *Walkenhauer v. Chicago, B. & G. R. Co.*, 15 Am. & Eng. R. R. Cas. 490.

But see, contra, *Marcott v. Marquette, H. & O. R. Co.*, 47 Mich. 9; s. c., 4 Am. & Eng. R. R. Cas. 548; s. c., 49 Mich. 99; s. c., 8 Am. & Eng. R. R. Cas. 806.

LOUISVILLE AND NASHVILLE R. R. Co.

v.

GREENE'S ADMINISTRATOR.

(*Advance Case, Kentucky. February 27, 1884.*)

A boy of sixteen, of average intelligence, who had all his life lived near the line of a railroad, lay down upon the trestle-work of a railroad bridge spanning a creek, which was half a mile from a public crossing; and remained there some three quarters of an hour. A train upon the railroad track travelling at an ordinary rate of thirty to thirty-five miles an hour on a down grade sounded its whistle on approaching the public crossing before referred to, and then continued on towards the bridge. The engineer saw the boy first when from 800 to 500 feet off, and immediately sounded the whistle and applied the brakes. The train, however, ran over and killed the boy and went on some distance beyond him before it could be stopped. In an action by the boy's administrator to recover damages for his death, the court charged in substance that if the employees of the road were negligent in not discovering the boy on the track in time to avert the disaster, the railroad company was liable, notwithstanding the negligence of the boy in the premises.

*Held*, that the instruction was error, and that the company was not liable unless its servants after discovering the perilous condition of the boy might by the exercise of ordinary diligence and care have prevented the injury.

There was certainly no such evidence of wilful negligence in the above case as would entitle the plaintiff to recover punitive damages.

THE COURT.—Wash. Green as administrator of his son sued appellant for ten thousand dollars damages on the ground that his intestate was killed by the wilful neglect and carelessness of the agents and employees of the road in running its train. The action is twofold in its character—to recover punitive damages, under Section 3, Chapter 57, Gen. Stat.; and compensatory damages under Section 1 of the same chapter. A jury trial resulted in a verdict and judgment for \$360, to reverse which this appeal is prosecuted. That the verdict was contrary to the evidence was relied on as one of the grounds for a new trial, but is not here assigned for error, and cannot be inquired into under the general and indefinite assignment that it was error to overrule the motion for a new trial. The only question presented concerns the action of the court in giving and refusing instructions. A careful consideration of the testimony will satisfy any reasonable mind that there is no element of wilful negligence in this case, and the court should not have given any instruction on this question. It is contended that the court erred in

expounding the law as to ordinary care and contributory negligence. The jury were told in substance that if Green came to his death by reason of his own negligence in being on the track, they should find for the defendant, unless they believed that the agents of the defendant in running the train could by the exercise of ordinary care have discovered the boy on the track, and, having due regard to the safety of the passengers, could have stopped the train in time to avoid the collision, in which latter event they should find for the plaintiff compensatory damages.

The proof shows that appellee's intestate was a boy about sixteen years old, and of average intelligence; that for several years he had lived within a few hundred yards of the railroad; that from one half to three quarters of an hour before he was run over and killed he was lying diagonally on the track, between the rails, on a curve in an open field, on a trestle spanning a creek, four or five feet deep and fifteen feet wide—which was about four miles from the city of Henderson; that the trestle was half a mile beyond the crossing of a public road and some several hundred yards north of a lane separating two farms—a neighborhood passway so little used that trains did not sound their whistle on approaching it; that the train that killed the boy left the city of Henderson ten minutes late and about ten minutes past ten o'clock A.M., and was composed of three passenger cars, two baggage cars, an engine and tender; that when the boy was first seen by the engineer the train was between the public road and lane referred to, was running on a down grade of forty feet to the mile and at a speed of from thirty to thirty-five miles an hour, and that when the boy was discovered on the track, the train was not more than from 300 to 500 feet from him; that as soon as the object on the track was discovered by the engineer to be a man, he gave three sharp shrill whistles to frighten him from the track; that as soon as the object was discovered to be a man, the brakes were immediately applied to stop the train; that on the grade and running at the speed it was—not unusual—the train could not have been stopped with safety short of four or five hundred yards; that everything was done to stop the train as speedily as it could have been done with safety; that the train ran over the boy, going beyond him some four or five hundred yards before it was stopped. It also appears that in crossing the public road which was a half mile from the trestle, the usual whistles were sounded and loud enough for a person on the trestle to hear, and that after crossing the public road before reaching the curve, the train passed through a cut. Under this testimony it seems to me the court erred in giving to the jury the third instruction. If the appellee's intestate was guilty of negligence which resulted in his death, no recovery can be had unless the persons in charge of the train were aware of his negligence, and after discovering him on the track could, by the exercise of proper care and diligence, have

avoided the injury. The instruction makes the failure to discover the boy on the track an element of negligence, and says to the jury, in effect, that the plaintiff was entitled to recover if the employees of the road were negligent in not discovering him on the track in time to avert the disaster, even though his death might have been caused by his own culpable negligence in placing himself on the track. In *K. C. R. R. Co. v Dils*, 4 Bush. 593 it was held that if an injury was the compound result of negligence on both sides, the plaintiff could recover nothing unless the defendant's agents saw his perilous condition and might, by the exercise of ordinary diligence and care, have prevented the injury after seeing him. In *Paducah & Memphis R. R. Co. v Hoehl*, 12 Bush. 46, the court says, in discussing the case, which was an action for injuries sustained by a girl twelve years old, at a crossing, in a town by being run over by a passing train: "She had crossed the track of this road nearly every day for some time prior to the accident, in attending her school on the east side of the town, and it was her duty to take notice of the usual and customary signals given by trains on their approach, and if such signals were given by the train inflicting the injury and sufficient to warn one of ordinary diligence and care of its approach and the danger of crossing at the time, the injury is the result of her own negligence and she is without remedy unless the jury should believe that those managing the train were aware of her negligence and after discovering her upon the track could, by the exercise of proper care and diligence, have avoided the injury." The same opinion quotes with approval the rule laid down in *Shearman & Redfield on Negligence*, p. 25, which coincides with the doctrine in the cases cited.

The second instruction was objectionable because it leaves out of view the fact of the intestate's contributing to his own death by being on the track.

No other substantial error is perceived, but for the reasons indicated the judgment is reversed and cause remanded for a new trial.

**Duty to Parties Lying on Track.**—The following cases are somewhat similar in facts and analogous in principle to that above reported. *Nashville, etc., R. Co. v. Smith*, 6 Heisk, 174; *O'Keefe v. Chicago, etc., R. Co.*, 32 Iowa, 467; *Richardson v. Wilmington & M. R. Co.*, 8 Rich. L. (S. C.) 120; *Felder v. Louisville, C. & C. R. Co.*, 2 McMull (S. C.), 403; *Herring v. Wilmington & Raleigh R. Co.*, 10 Ned. (N. C.) 482; *Manby v. Wilmington & Weedon R. R. Co.*, 75 N. C. 655; *Houston & T. C. R. Co. v. Sympkins*, 6 Am. & Eng. R. R. Cas. 11; *Meeks v. Southern, Pac. R. Co.*, 8 Am. & Eng. R. R. Cas. 314; *Paducah, etc., R. Co. v. Letcher* 12 Am. & Eng. R. R. Cas. 61; *East Tenn., & Ga. R. R. Co. v. Humphreys, Adm'r*, 15 Am. & Eng. R. R. Cas. 472; *Dinzwiddie v. Louisville & Nashville R. Co.*, 15 Am. & Eng. R. R. Cas. 483; *Keyser v. Chicago & G. T. R. Co.*, *supra*.

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Am & Eng. R. R. Cas. 306) it held that a charge to the jury to the effect "that if a construction of a fence at the place of injury would have prevented the accident and saved the child, then it was negligent in defendant not to have had a fence there," was eminently fair, referring to the charge requested by plaintiff's counsel.

The object of the statute requiring the company to fence its track was to prevent injury from passing trains to persons and animals coming upon and using the same, and when an injury occurs without fault of the plaintiff to either in consequence of the neglect of the company to maintain the required fence, it must be held such negligence as will authorize a remedy. The child in this case was too young to know or understand anything of the danger or consequences of going upon the track before a passing train, and, of course, no wrong, fault, or negligence could properly be attributed to him in going where he did, or in doing what he did.

The statute requires the defendant to fence its road with a good fence, four and one half feet high. It seems to me that it cannot be successfully contended that such a fence would not have been a very formidable obstruction to the child's going upon the defendant's right of way. It may have been sufficient to prevent his going there entirely, and, if so, evidence of the negligence of the company to place the fence there was competent and material.

Counsel for plaintiff requested the court to charge the jury that "by the statute it is made the duty of the railroad company to fence both sides of its track, and if, for want of proper fences, injury results to a child, it was negligence on the part of the company to fail so to fence." This the court refused, and charged the jury: "In this case you will not consider any evidence in regard to the fact that there was no fence upon the sides of the defendant's railroad." I think the charge thus given, as well as the refusal of the court to charge as requested, were both erroneous.

The question of the parents' negligence in this case, under the circumstances, was one for the jury, and therefore needs no further attention. Neither is it necessary to consider the third ground of negligence relied upon by plaintiff's counsel.

For the errors herein stated I think the judgment should be reversed, and a new trial granted.

**Persons Lying on Track.**—Upon the question of the duty of the railroad company to such persons see note to *Louisville & Nashville R. R. Co. v. Greene's Adm'r*, *infra*.

**Fence Laws Applicable in Case of Injury to Cattle only.**—The fence laws are generally held applicable only in cases where cattle are killed or injured. They are ordinarily held to have no relation to cases of injuries to children. *L'Anglois v. Buffalo, etc., R. Co.*, 19 Barb. 364; *Fitzgerald v. St. Paul, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 310; *Walkenhauer v. Chicago, B. & G. R. Co.*, 15 Am. & Eng. R. R. Cas. 490.

But see, contra, *Marcott v. Marquette, H. & O. R. Co.*, 47 Mich. 9; s. c., 4 Am. & Eng. R. R. Cas. 548; s. c., 49 Mich. 99; s. c., 8 Am. & Eng. R. R. Cas. 306.

LOUISVILLE AND NASHVILLE R. R. Co.

v.

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**THE COURT.**—Wash. Green as administrator of his son sued appellant for ten thousand dollars damages on the ground that his intestate was killed by the wilful neglect and carelessness of the agents and employees of the road in running its train. The action is two-fold in its character—to recover punitive damages, under Section 3, Chapter 57, Gen. Stat.; and compensatory damages under Section 1 of the same chapter. A jury trial resulted in a verdict and judgment for \$360, to reverse which this appeal is prosecuted. That the verdict was contrary to the evidence was relied on as one of the grounds for a new trial, but is not here assigned for error, and cannot be inquired into under the general and indefinite assignment that it was error to overrule the motion for a new trial. The only question presented concerns the action of the court in giving and refusing instructions. A careful consideration of the testimony will satisfy any reasonable mind that there is no element of wilful negligence in this case, and the court should not have given any instruction on this question. It is contended that the court erred in



the proper signal of the train's approach, and even with the signal given, the company might be held responsible for the reckless running of the train at the crossing, as was held by this court in the case of the Louisville & Cincinnati R. R. Co. v. Goetz, Administrator, *infra*. In that case, the right to the use of the road at the crossing was mutual, the company having the right to run on it with its trains, and the intestate the right to cross the track, it being a part of the ordinary highway. In the character of case cited both parties must exercise such care as men of common prudence and intelligence would ordinarily use under such circumstances. In the case before us the company had the exclusive right to the use of the road at the place where the appellee's intestate lost his life, and we see no reason for making the company responsible unless it should appear that those in charge of the train, after discovering the condition and danger of the party injured, could, by the exercise of the proper care, have avoided the injury.

The error committed by the court below is embodied in instruction No. 1, given at the instance of the plaintiff, with reference to the rules of the company, and for that reason a non-suit was ordered.

There is a rule of the company requiring "all special and irregular trains, whether running by telegraph orders or not, must be run with great care, and whistle sounded one-half mile from all abrupt curves and obscure highway crossings, and when approaching stations." This rule was read to the jury as evidence, against the objection of the appellant, and proof introduced conducing to show that no whistle was heard at the curve, or at any other time, until it reached some station far beyond the point where the accident happened. This rule of the company, together with other rules regulating the running of trains, is made part of the record, and while they have been adopted for the safety of the passengers and the proper running of the trains, and to notify those who have the right to the use of any part of the road of the train's approach, the rule in question with reference to blowing the whistle when approaching abrupt curves was intended to avoid obstructions, and not designed for the protection of those who are so reckless of their own lives as to undertake to convert a railroad track into a common passway. The court told the jury that it was the duty of those in charge of the train to blow the whistle at abrupt curves, and if no such signal was given when Howard was killed, and if it had been given he would not have been killed, they must find for the plaintiff.

This instruction should not have been given, but on the facts of the case, as presented by the plaintiff, a verdict for the defendant should have been entered. After the intestate had placed his life in peril, it was the duty of those in charge of the train, when made

aware of his danger, to use all reasonable means at their command to save his life; but neither the engineer nor the fireman were required to know or to anticipate the presence of any intelligent human being on that part of the road at eleven o'clock at night. The right of a railroad company to use its track is exclusive of the public, except where they have the right to cross it, or where its uses in a reckless or improper way must necessarily endanger the lives of those whose proximity to the road requires the exercise of care and caution by those running railroad trains. In passing through cities, towns, or places where persons congregate, greater care and caution must be exercised than on that portion of the road where human beings have no right or license to travel. The speed with which the train is propelled in such a case cannot be said to be wilful neglect on the part of the company as to one who voluntarily places himself on the track, and is injured by reason of his own carelessness.

To adjudge otherwise would be to convert the track of the railway into a public road for the use of all who choose to go upon it, nor is it negligence of a less degree for which a recovery can be had, for the act of the party complaining was the direct and proximate cause of the injury. It is evident from the facts before us that the intestate lost his life by placing himself in such a position as made the danger to himself imminent, and but for such reckless action on his part would have received no injury. There was the absence of all care on the part of the intestate in protecting himself against the danger, and while it was the duty of those in charge of the train to avoid running over him, and to exercise even more than ordinary care for that purpose when apprised of the danger to which he was exposed, in this case there is no proof or any fact from which an inference might be drawn that the company's employees knew that the plaintiff's intestate was on the track; nor was there any reason upon which they could have based the belief that the intestate or any one else was using the track of the road as a passway at or near the point where the injury was inflicted.

The plaintiff's own testimony shows gross neglect on the part of the intestate, and the absence of any neglect on the part of the employees of the company.

Rules and regulations adopted by the company for the protection of its passengers and trains do not apply to trespassers on its road, whose own wrongful and negligent conduct places them in danger, and the only obligation or duty on the part of the company or its employees in such a case is, when made aware of the danger, to avoid inflicting any injury if, by the exercise of ordinary diligence, they can prevent it.

When the facts are conceded upon which the charge of negligence is based, it then becomes a question of law as to whether a

case of negligence has been established, and the plaintiff's own testimony failing to show any cause of action, the court below should have instructed the jury to find for the defendant. The judgment below is therefore reversed and the cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

**Rule Requiring Signals not Intended for Protection of Trespassers on Track.**—A rule, ordinance, or statute requiring the sounding of the whistle or ringing of a bell at certain points will not be construed as intended for the protection of trespassers on the track, and a failure to comply with such rule, ordinance, or statute cannot therefore be complained of by such trespassers in case of injury. *Elwood v. New York, etc., R. Co.*, 4 Hun, 808; *Harty v. Central R. R. Co.*, 42 N. Y. 468; *O'Donnell v. Providence, etc., R. Co.*, 6 R. I. 211; *Holmes v. Central R. R. & B. Co.*, 37 Ga. 593; *Philadelphia, etc., R. Co. v. Spearen*, 47 Pa. St. 300; *Bell v. Hannibal & St. Jo R. R. Co.*, 4 Am. & Eng. R. R. Cas. 580; *Baltimore & Ohio R. R. Co. v. Depew*, 12 Am. & Eng. R. R. Cas. 64; *Rosenberger v. Grand Trunk R. Co.*, 15 Am. & Eng. R. R. Cas. 448. But see *Western & A. R. Co. v. Jones*, 8 Am. & Eng. R. R. Cas. 267.

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EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co.

v.

FAIN.

(12 B. J. Lea's Reports (Tenn.), 35.)

Although a person be injured by a railroad train while unlawfully on the track of the road, or while contributing to the injury by his own carelessness, yet if the injury might have been avoided by the use of ordinary care and caution by the railroad company, the company will be liable in damages, the negligence of the party injured being taken into consideration, by way of mitigation, in estimating the damages.

It is not error to charge the jury thus: "You are the sole judges of the facts, and the law as given in charge by the court." The language, although unusual in a civil case, plainly meaning that the jury must take the law as given by the court, and be the judges of its application to the facts.

It is not error to refuse the following charge: "A railroad company is not liable, where no evil intent or wanton conduct appears, for injuries by its trains to intruders who undertake to use the track for some business purpose of their own, or to persons who are unlawfully walking, remaining upon or crossing its track."

A judge cannot be put in error by not doing more than he was asked to do, when, so far as appears, the party complaining was satisfied at the time with what was done; as where, when a written proposition, which he was requested to charge, was read to him in the presence of the jury, and he said, "Let the jury have the instruction as a part of the charge," without formally

repeating it to the jury as a charge. A charge correct in itself as far as it goes, but not complete, is no longer objectionable if the omission be supplied by the adoption by the court of a special request directed to the omitted point or matter.

APPEAL in error from the Circuit Court of Knox County.

W. M. Baxter for company.

Jno. Green and G. W. Pickle for Fain.

COOPER, J.—The railroad company has appealed in error from a verdict and judgment against it in favor of Fain for damages for a personal injury to him from a moving engine and tender, resulting in the loss of one of his legs above the ankle. The referees have reported in favor of affirming the judgment, and the company has excepted to the report.

Fain was in the employment of a business house at Knoxville, his duties requiring him to pay some attention to the customers of the house coming in by the railroad trains. On the night of the accident, he was at the hotel near the depot until the night train came in about twelve o'clock. He had been drinking beer alone, according to his own account, somewhat freely, and probably beer mixed with some spirituous liquor. At any rate, he was so far under the stimulus of his potations as to stagger in his walk. He left the hotel shortly after the train came in, and after having examined the register of the new arrivals for acquaintances. He seems to have started from the hotel by the back way down a street parallel to the railroad going west, but afterwards returned, and went down the road-way itself in the same direction, walking between the rails. The night was dark and rainy, and there is proof tending to show, and the jury must have so found the fact, that while thus walking down the track he was struck by the tender of an engine backing in the same direction. The engine and tender had come in with the train, but were detached, and after having been rubbed off and the tender filled with coal, were being backed down to the round-house to be laid by for the night. The theory of the plaintiff below is that the tender came upon him so suddenly and rapidly, without any light being shown and without the bell being rung, that he was unable to get off the track before he was struck. The theory of the defence is that the plaintiff had gone to sleep on some plank by the side of the road across a ditch, and had thrown his foot upon the rail. The plaintiff's own testimony was that he was walking on the track, and there is no evidence that he was lying or sleeping as claimed by the company, the fact being insisted upon only as a reasonable inference from the circumstances. The plaintiff was found in a ditch by the side of the road, with his foot crushed. There is proof that the road-way of the company where the accident occurred was used by the people at all hours, without objection by the company, in going to and from the direc-

tion taken by the plaintiff, and that it was the nearest route to his destination from the depot.

The errors principally relied on for reversal are in the charge of the court to the jury. The trial judge gave first a general charge, and then made parts of his charge, four out of five, of the special requests of the defendant below. The error which should reverse in such a case ought to be positive and plain.

The first objection made is to the following charge: "If you find from the evidence that both parties were guilty of some negligence, contributing to cause the injuries to plaintiff as alleged, but different degrees of negligence, the plaintiff being less at fault, and guilty of the less degree of negligence, the law is that such negligence on the part of the plaintiff will not defeat his right to a recovery, but it is proper matter for the consideration of the jury in mitigation of damages."

This is the closing paragraph of the judge's general charge upon the subject of negligence. He had already charged, in language not excepted to, that if the defendant had negligently run one of its engines and attachments over the plaintiff, as alleged in the declaration, all else out of the way, the plaintiff would be entitled to recover. And on the other hand that if the injury was caused by the plaintiff's own negligence, he would not be entitled to recover. He had then explained to the jury the degree of caution and care required by law from the defendant in the pursuit and management of its business, and in running its engines and trains, for the safety of third persons. He had also explained to them the diligence and caution required by law from the plaintiff, without the exercise of which he could not recover. He then defines contributory negligence, and how the rights of the parties would be affected by the greater or more immediate negligence in bringing about the injury, and says to the jury that if they find that both parties were in equal degree guilty of negligence, the plaintiff would not be entitled to recover. Then follows the clause excepted to. But, in a charge otherwise full and free from exception, this was only saying to the jury, that the negligence of the defendant which is not the proximate cause of the injury, nor such as would exclude a recovery on his part, may nevertheless be taken into consideration, by way of mitigation, in ascertaining the damages. And any possible defect in the charge was fully covered by the special requests of the defendant made a part of it by the court, and which the defendant must have intended to cover every point of law essential to its defence.

Negligence, when the evidence is conflicting, is a mixed question of law and fact, the fact to be found by the jury upon a proper charge of law by the court. But negligence is itself often not a fact which is the subject of direct proof, but an inference from facts put in evidence. And negligence may be disputed when the

facts are undisputed, in which case the question is eminently one for the jury under the direction of the court. Whart. Neg., sec. 420. The principles of law regulating the subject are well settled in this State. Where a person uses his own property carelessly and negligently, without a reasonable degree of care and caution not to injure others such as a prudent man would under the circumstances have observed, especially where injury was likely to ensue, he will be civilly liable. And this upon the principle that a gross disregard of the interest of others is not distinguishable, either in point of moral guilt or evil results, from a malicious intention to injure. If a party by his own gross negligence bring an injury upon himself, or proximately contribute to such injury, he cannot recover. Neither can he recover in cases of mutual negligence where both parties are equally blamable. But although guilty of negligence, yet if the party cannot, by ordinary care, avoid the consequence of the defendant's negligence, he will be entitled to recover. He is considered the author of the injury, by whose first or more gross negligence, in the sense of proximate negligence, it has been effected. *Whirley v. Whiteman*, 1 Head, 611; *Nashville & Chattanooga R. R. Co. v. Carroll*, 6 Heis. 347, 367. In the case of contributory negligence, the inquiry is, whose conduct or neglect more immediately produced the wrong or injury done. If the act or neglect of the defendant, then for that conduct or neglect he should be held responsible. If the injury was caused by the conduct, or was the immediate result of the conduct, of the plaintiff, to which the wrong of the defendant did not contribute as an immediate cause, then plaintiff should not recover, but should bear the results of his own conduct or neglect. If defendant was guilty of a wrong by which plaintiff is injured, and plaintiff was also in some degree negligent or contributed to the injury, it should go in mitigation of the damages, but cannot justify or excuse the wrong. "The principle is," says Freeman, J., "the mere fact that one person is in the wrong does not necessarily discharge another from the observance of proper care towards him, or the duty of so exercising his own rights as not to do him an unnecessary injury." *Dush v. Fitzhugh*, 2 Lea, 307. And the rule, that the carelessness or imprudence of the injured party might be considered by the jury in assessing the damages, has been applied in cases where the statutory requirements prescribed in the running of railroad trains have not been observed. *Louisville & Nashville R. R. Co. v. Conner*, 2 Baxt. 382. The mere fact that a party is a trespasser will not prevent him from recovering for injuries negligently inflicted by another which might have been averted by ordinary and proper prudence on the part of the latter. And, therefore, although a person be injured while unlawfully on the track of a railroad, or while contributing to the injury by his own carelessness or negligence, yet if the injury might have been



avoided by the use of ordinary care and caution by the railroad company, the company will be liable in damages for the injury. Whart. Neg., §§ 336, 388. The charge of the trial judge, including the special requests made a part thereof, is in accordance with these principles.

It is next insisted that the court erred in saying to the jury: "You are the sole judges of the facts and the law as given in charge by the court." The argument is that this was in effect saying to the jury that they were the judges of the law as well as the facts. But the language conveys no such meaning. On the contrary, it fairly implies that the jury are to take the law as given to them by the court in the charge. It is a rather unusual expression to say in a civil case that the jury are the judges of the law thus given, borrowed from the administration of the criminal law, where the conclusiveness of a general verdict in favor of the defendant virtually makes them such judges. But the meaning of the judge plainly is, by the form of expression, that you must take the law as given you by the court, and be the judges of it by applying the same to the facts.

The plaintiff in error complains that the trial judge refused to charge his first request as follows: "The defendant, except at crossings established by law, has the exclusive right to its track at all times. It is not required to anticipate the intrusion of wrongdoers. A person entering without right on the company's track does so at his peril, and cannot recover for injuries suffered by him in a collision with its engines, except when it inflicted them intentionally and wantonly. Its duty to trespassers is only the negative one, not to act maliciously or with obvious disregard of consequences. It is not liable where no evil intent or wanton conduct appears, for injuries to intruders who undertake to use its track for some business purpose of their own, or to persons who are unlawfully walking, or remaining upon, or crossing its track." But this is clearly not the law in this State. Even without reference to the provisions of the statutes regulating the conduct of railroads in running their trains within the limits of municipal corporations, or when an obstacle appears on the roadway, the proposition is not correct. The law affords a party a remedy by civil action to recover damages for an injury to his person or property, caused either directly or consequentially by the negligence, inadvertence, or want of proper precaution on the part of another, although such injury may have been purely accidental and unintentional. The mere lawfulness of the act from which the injury resulted is no excuse for the negligence, unskilfulness, or reckless incaution of the party. *Tally v. Ayres*, 3 Sneed, 677; *Weaver v. Ward*, Hob. 134. Nor, as we have seen, will the fact that the injured party is a trespasser deprive him of the right of action. He is still entitled to recover for injuries negligently inflicted by another which might

have been averted by ordinary and proper prudence on the part of the latter. Whart. on Neg., § 340 et seq.

It is very true that a person walking on a railroad track, unless under contract of some sort with the company, or by their invitation, or on a highway crossing, has no right to expect that the road shall be kept fit for travellers so walking, and though he, as one of a general body of citizens, has, without opposition from the company, been in the habit of using the track, he cannot expect adaptations to be made in running the trains in consequence of his probable presence, or any precautions to be taken to meet in advance the contingency of his presence. It is also true that there is a conflict in the authorities as to the relative rights of a railroad company and a person merely permitted, with others, to use its track as a pathway. Whart. on Neg., § 388*a*; Railroad Co. v. Shearer, 58 Ala. 672; St. Louis R. R. Co. v. Galbreath, 1 Cent. L. J. 575; Ill. Cent. R. R. Co. v. Godfrey, 14 Am. Law. Reg. 290. But there is nothing in the charge of the court in this case, or in the requests made by the defendant, nor in the facts, to take the case out of the general rule as above, or to require a further consideration of the authorities. The matter of the special instruction having been embodied in the charge, it was the duty of the defendant to see that the instructions asked were strictly correct. *Sommers v. Railroad Co.*, 7 Lea, 201; *Rea v. State*, 8 Lea, 356.

The next objection is to the manner in which the trial judge gave his assent to the propositions of law he was specially requested by the defendant to charge. The bill of exceptions shows that these propositions were read to the court in the presence and hearing of the jury, and that his honor said as each was read: "That instruction can go to the jury as part of the charge;" or "let the jury have it as part of the charge:" or words of similar import. The objection is that he did not repeat the propositions to the jury formally as a part of the charge. But there was no request to do this. The defendant's counsel was satisfied at the time with the assent of the court to the law as propounded in the requests, and these requests, which were in writing, were no doubt handed to the jury. The trial judge cannot now be put in error by not doing more than he was asked to do, when, so far as appears, the defendant was satisfied at the time with what was done.

Objection is also made to the following clause of the judge's charge: "On the other hand, the plaintiff is required by law to have exercised at the time of the alleged injury such care, diligence, and caution for his own safety as a person of ordinary prudence and caution would have exercised, situated as he was at the time of the alleged injury, and if his neglect to exercise such care caused him injury, the law is he can recover." The objection is to the words "situated as he was at the time of the alleged injury," because, it is argued, the plaintiff was at the time in a drunken sleep and was

incapable of exercising prudence and caution. The charge was, no doubt, intended to apply to the plaintiff upon the theory that he was walking on the track, and is unexceptionable as far as it goes. The error, if error there be, was in not also charging upon the theory of the defendant as to the condition of the plaintiff. But the omission was supplied by the adoption by the court of the request of the defendant directed to that very point, namely: "That if the accident occurred by reason of the drunkenness of the plaintiff as its efficient cause, the plaintiff cannot recover."

Counsel on both sides, as is apt to be done in cases like the one before us, dwelt largely in their arguments upon the various aspects of the facts. But the facts have been passed upon by the jury, and the question of negligence, when it is to be inferred from the facts, "is eminently one for a jury." We cannot invade the province of the jury when there is any evidence to sustain the verdict, and it is not pretended that there is no such evidence in this case.

Confirm the report of the referees, and affirm the judgment of the circuit court.

**Analogous Case.**—The reader is referred to *East Tenn., Va., & Ga. R. R. Co. v. Humphreys*, Adm'r, 15 Am. & Eng. R. R. Cas. 472, and annotation, with full citation of authorities in point and statement of the peculiar provisions of the Tennessee Statute.

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## McALLISTER

v.

BURLINGTON AND N. W. RY. CO.

(*Advance Case, Iowa. September 19, 1884.*)

Where an adult person, in full possession of mind and senses, for his own convenience, walks upon a railroad track, away from a crossing, where he has no right to be, while it would be the duty of the persons operating trains, if they saw him, and could avoid injuring him, to do so, if they did not see him, and were ignorant of his dangerous position, they would not be bound to look out to save him from injury; and, in the event of injury, he would not be entitled to recover, and the jury should be so instructed.

APPEAL from Des Moines District Court.

This is an action for a personal injury which the plaintiff alleges he received by being run over by one of defendant's trains. There was a trial by jury, and a verdict and judgment for the plaintiff.

Defendant appeals.

Kelly and Cooper for appellant.

T. J. Trulock and J. W. C. Jones for appellee.

ROTHROCK, J.—1. The defendant owns and operates a narrow-gauge railroad running from Burlington to Washington, in this State. For a few miles out of the city of Burlington it uses the track of the Burlington, Cedar Rapids & Northern R. R. Co., which is of standard gauge. It is enabled to use this track by a third rail laid in such a manner as to make the proper gauge for its engines and cars. The plaintiff was injured upon this part of the line, and the evidence leaves the question in doubt as to whether it was a train of the defendant company or of the Burlington, Cedar Rapids & Northern Co. which inflicted the injury. We think the jury was warranted from the evidence in finding that it was the train of the defendant, and for the purposes of this opinion this fact will be conceded.

2. At the close of the introduction of the evidence the defendant moved the court to instruct the jury to return a verdict for the defendant. And again, after the argument of the case, instructions to the same effect were asked. These requests were refused; and as it is now claimed these rulings of the court were erroneous because there was no evidence authorizing a verdict for the plaintiff, it becomes necessary to set out the facts of the case somewhat in detail. They are as follows: On the evening of March 6, 1882, the plaintiff started to walk from the city of Burlington to the residence of his father, a distance of about six miles. The public road upon which he travelled crossed the railroad track some two or three miles from the city, and, when he reached the crossing, instead of keeping on the public road, he walked along the railroad track for one half or three quarters of a mile. The two roads for this distance were close together, and, for the greater part of the distance, ran parallel. When he reached a point where the roads diverged, he left the railroad track and attempted to reach the highway. The railroad right of way was fenced with a barbed-wire fence, which was difficult to pass, and the plaintiff went back on the railroad track and walked back towards Burlington, intending to leave the railroad at a crossing some distance in that direction. It was after nightfall, and, while walking back towards said crossing, a train, consisting of an engine and five cars, which was running at the rate of 13 to 15 miles an hour, came down from the north, running in the same direction plaintiff was walking, and struck and ran over him, by which he was severely and permanently injured. It is conceded that the headlight on the engine was burning, and that it could have been plainly seen for a distance some 2000 feet from the point where plaintiff returned to the track, and to the place where he was injured, and the wind was blowing in the direction which the plaintiff was travelling. The plaintiff was in full possession of the organs of sight and hearing, and it is not claimed that he was imbecile or in any manner mentally diseased. The evidence conclu-

sively shows that the engineer and other employees operating the train did not see the plaintiff, and did not know of the accident until the next day.

The foregoing is a plain, unvarnished statement of the facts in the case, about which there is no dispute. We think that it should be held, as matter of law, that the plaintiff has no right of recovery. It is, perhaps, true that by walking upon a railroad track, at points away from public crossings, persons are not technically trespassers. They are not trespassers in the sense that they are liable to actions by the owners of the road. A person who for pleasure or from curiosity enters a manufactory, and walks among the machinery, and exposes himself to danger, is not a trespasser in a legal sense. But if he does not keep out of the way of the machinery, and is injured, he cannot recover, because he put himself in a place he had no business to be, and his very presence is contributory negligence. So where an adult person, in full possession of mind and senses, for his own convenience, walks upon a railroad track, away from a crossing, he is in a place where he is not invited, and he has no right to demand that the persons operating trains shall be on the lookout to save him from injury. If we understand the plaintiff, he claims that, because the view was unobstructed, the engineer should have seen him, and avoided injuring him by some signal or otherwise. It cannot be denied that the plaintiff was negligent. He permitted a train, which was in full view for 2000 feet, and running at a low rate of speed, to run him down and injure him, and at a point where he had no right to be. It is true that if the engineer had discovered that plaintiff was on the track, and if after he saw that the train was so close to him as to be dangerous, and he could have avoided the injury by the exercise of reasonable care, it was duty to do so. *Morris v. C., B. & Q. Ry. Co.*, 45 Iowa, 29. But as he did not see him, and was ignorant of any danger to the plaintiff, it was not obligatory upon him to look out for him, or warn him off.

The principles we here announce have been so often promulgated by this and nearly all other courts of last resort in this country that they have become elementary. A citation of the numerous cases would be a work of supererogation, and in closing this opinion we cannot better express our views than to repeat the language of the court in the case of *I. C. R. R. v. Hall*, 72 Ill. 222: "It is negligence for a person to walk upon the track of a railroad, whether laid in the street or upon the open field, and he who deliberately does so will be presumed to assume the risks of the perils he may encounter. The crossing of a track of a railroad is a different thing. The one is unavoidable, but in the other case he voluntarily assumes to walk amid danger constantly imminent. . . . It was shown that trains passed frequently. No

prudent man would expose himself on that part of the road without keeping a constant and vigilant watch for the approach of trains. This appellee did not do. . . . If a party will not exercise ordinary care for his personal safety he ought to bear the consequences that may ensue."

We think the court should have instructed the jury to return a verdict for the defendant.

Reversed.

**Company Owes no Duty to Trespassers on Railroad Track.**—A railroad company is not bound to keep a lookout for trespassers walking upon the track. When such parties are injured by a passing train they have only themselves to blame, and cannot recover unless the servants of the company have been negligent after becoming aware of the trespasser's perilous position. *Lafayette, etc., R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Cincinnati, etc., R. Co. v. Eaton*, 58 Ind. 310; *Evansville, etc., R. Co. v. Wolfe*, 59 Ind. 89; *Carroll v. Minnesota, etc., R. Co.*, 13 Minn. 30; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn., 293; *Herring v. Wilmington, etc., R. Co.*, 10 Ire. (N. C.) 402; *Railroad Co. v. Norton*, 24 Pa. St. 465; *Philadelphia v. Reading R. Co. v. Hummell*, 44 Pa. St. 375; *Northern Central R. Co. v. State*, 6 Am. v. Eng. R. R. Cas. 66; *Colorado Cent. R. Co. v. Holmes*, 8 Am. & Eng. R. R. Cas. 410; *Terre Haute & Ind. R. R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas., 77; *Carter v. Columbia & S. C. R. Co.*, 15 Am. & Eng. R. R. Cas. 422; *Baltimore & Ohio R. R. Co. v. Depew*, 12 Am. & Eng. R. R. Cas. 64.

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SOHITTENHELM'S ADMINISTRATRIX

*v.*

LOUISVILLE AND NASHVILLE R. R. Co.

(*Advance Case, Kentucky. October 18, 1883.*)

A farmer turned his stock loose upon the track of a railroad on Sunday, not expecting any trains to pass. Hearing a train approaching, he got upon the track to drive his stock off; and, although the train was in plain sight from the time it was several hundred yards off, failed to escape in time, and was killed. *Held*, that he had been guilty of such conduct as precluded all right of recovery, the railroad company not being in fault.

**THE COURT.**—After a careful reading of the testimony in this case, we see no reason why the motion for a non-suit should not have prevailed. That motion was overruled and a verdict on the merits returned for the defendant.

The jury by a special finding said that the company was not guilty of negligence, and that the deceased caused his death by his own folly. He had turned his stock from his own premises on Sunday to graze upon the track of the railroad, under the belief that no trains would pass on that day. A special train seems to have been required, and, as was unusual, made its appearance near Walton at a time when not looked for by the deceased. He lost



his life in the effort to save his stock, or to prevent injury to the train by reason of his stock being upon the road. He knew the train was approaching, for it was the noise of the train that caused him to drive his stock from the road. He was at a point where there was no crossing, and where he could be seen by those on the train several hundred yards off. He ought to have realized his danger, while the employees of the company had every reason to believe that he would leave the track. In fact, when seen by the employees, he was not on the track, and, if on it, the necessity for leaving the track was so apparent that any rational man must have supposed that the deceased would have, as he could have done, left the track and saved his life.

The proof is, that as the train approached the unfortunate man, the whistle was sounded, and put down brakes, but it was then too late to save him.

The unobstructed view of the man and the road was of itself convincing to those running the train that the man would leave the track. Nothing was done to stop the train until within about one hundred and twenty yards of the deceased; the employees believing, as they had a right to believe, that he would leave the road.

The conductor was not compelled to stop at the station, or, so far as the deceased was concerned, to run the train fast or slow. The deceased was where he had no right to be, and in the exercise of ordinary care and judgment, those running the train had no right to apprehend danger to the deceased under the circumstances; and, certainly, there is no case of wilful neglect shown by the appellant. The proof conclusively shows that the death of the appellant's intestate was the result of his own neglect.

Judgment affirmed.

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Foss et al.

v.

CHICAGO, M. AND ST. P. R. Co.

(*Advance Case, Minnesota. May 25, 1885.*)

A railroad company's station in a certain town was in a cut. The track ran alongside a freight platform also in the cut. The station agent directed a party with a loaded wagon of goods to be delivered to the company as freight to drive up to the platform partly on the track. While so doing he was run over and injured by a car which the agent had previously directed to be moved upon the track. *Held*, that the company was liable.

APPEAL from a judgment of the District Court, McLeod County.  
E. S. Alexander for respondents, Alonzo G. Foss and others,  
partners, etc.

A. T. Fitch and W. H. Norris for appellant, Chicago, M. & St. P. Ry. Co.

GILFILLAN, C. J.—On both the questions of defendant's and plaintiffs' negligence, the case was fairly one for the jury. It appears that along the south side of defendant's freight depot, at Brownton, there runs a narrow platform used for loading and unloading freight, and receiving it for transportation; that along this platform runs a side track so near, as is fair to infer from the evidence, that a horse and dray could not be driven beside the platform without being, partly at least, on the track; that the track is in a cut, so that to a horse and dray, entering at one end of the depot to drive along the platform, there is no exit except by driving through to the other end of the depot. It is evident, therefore, that alongside of this platform is a dangerous place for teams to be when there are cars moving along this track; that, indeed, it is almost inevitable that they should be injured by any car passing. There was a car loaded with lumber standing on the track not far from one end of the depot, there being a down grade from where the car stood along past the depot. The evidence tends to show that defendant's agent, in charge of the depot, had just given the owner of the lumber leave to run the car by hand down past the depot to the owner's lumber-yard for the purpose of unloading, when the plaintiffs' servant, driving their horse and dray with a load to be shipped on the cars, asked the agent where he should deliver the load, and was by the agent directed to this side platform, and, not knowing of the leave to move the car, drove there accordingly. If the jury found these to be the facts, they might well find that defendant was negligent and plaintiffs' servant was not; for it was the clear duty of the agent, knowing as he did that it was not safe for a team to be beside this platform when a car was moving along the track, and that this car might be moved at any time, not to send plaintiffs' servant in there till the car had passed, or to see to it that the car did not move till he unloaded and got out; and plaintiffs' servant had a right to assume, from the direction of the agent, that the place would be safe for a reasonable time for him to drive in, unload, and drive out, and having no notice that the car was about to be moved it was not negligence in him to act on such direction; and the evidence was not such as to require a finding that the injury was in any way owing to anything done or omitted by the servant after he had driven into the cut.

Judgment affirmed.

BERRY, J., did not hear this case.

**Analogous Cases.**—See *Watson v. Wabash, St. L. & P. R. Co.*, and note, with cases cited, *infra*.

19 A. & E. R. Cas.—8

WATSON

v.

WABASH, ST. L. AND P. RY. CO.

*(Advance Case, Iowa. April 24, 1885.)*

A railroad company that allows cars, without warning, to be thrown violently back against other detached cars that are being unloaded, whereby a teamster engaged in unloading the cars is injured, is guilty of negligence, and, in the absence of contributory negligence on the part of the party injured, is liable therefor.

APPEAL from Pottawattamie District Court.

Action for a personal injury. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

D. H. Soloman and B. B. Burnett for appellant.

Mynster & Adams for appellee.

ADAMS, J.—1. After the introduction of the evidence, the defendant asked the court to direct the jury to render a verdict in its favor. This the court refused to do, and the defendant assigns the ruling as error. The defendant insists that the evidence not only failed to show negligence on its part, but failed to show a want of contributory negligence on the part of the plaintiff.

The circumstances under which the injury was received were substantially as follows: The plaintiff was a teamster, residing at Council Bluffs, and at the time of the injury was engaged in that city in hauling lumber, for the Chicago Lumber Co., from the cars on the defendant's track to the company's lumber-yard. He had, just prior to the accident, been sent by his employer to a particular car loaded with lumber, with instructions to transfer the lumber to the company's yard. He had stationed his team near the car, the rear of his wagon being towards the car, and had mounted the car, and had loaded from the car, upon the wagon, a small portion of the lumber, when he undertook to dismount. While dismounting, his foot was caught and crushed between the bumper of the loaded car and the bumper of another car which had been standing, detached, about 18 inches from the loaded car. The loaded car is denominated car A, and the other, car B. The two cars were standing upon one of four side tracks, where cars were accustomed to be placed for the purpose of being unloaded. Car B was propelled against car A by another car, called "Car C," which had been brought in by an engine, and had been thrown back, detached, against car B. The plaintiff did not hear

the approach of car C, and was not in any way, by ringing of bell or otherwise, warned of its approach. He was warned of the approach of an engine, and, while he did not know that it was coming in on his track, he apprehended that it or a car might be thrown against car B, and that that car might be thrown against car A. The engine was not in his view as he stood on car A, his view being obstructed by car B. But the warning he received caused him to proceed to dismount. In attempting to dismount he appears to have been actuated in part by a regard to his own safety and in part by a regard to the safety of his horses and wagon. The ends of the pieces of lumber upon the wagon were almost in contact with the car from which he was taking the lumber. If the horses had stepped back, the lumber on the wagon would have been brought in contact with the car; and if the car had been thrown back, as it was, in fact, it would have been liable to injure the wagon, if not the horses.

The plaintiff's purpose was to dismount and see whether a car or engine was coming in on his track, and if it was to start the horses forward. But, unfortunately, he did not have time. Car C came back too soon for him, and he was injured in the act of dismounting. The engine, of the approach of which he was warned by a bystander, does not appear to have come very near him. Car C, it appears, came in rapidly, and with so little noise as not to be observed by him. He complains that the defendant was guilty of negligence in throwing car C back with so much force, and without giving warning of it. The defendant complains that the plaintiff was guilty of negligence in attempting to dismount at all, and also in his mode of dismounting. A link projected from the draw-head of car B, and the plaintiff, in attempting to dismount, placed his left foot on the link, holding on to car A, and intending to step down backward upon his right foot. But before he could reach the ground his left foot was caught, and he pulled himself up again and remained until his foot could be disengaged. He might have jumped off instead of attempting to step off, but he appears to have been deterred from so doing by the fact that the ground was covered with broken rock. He might, perhaps, have stepped directly from the bumper of car A, but it was not very long, and he yielded to the temptation to brace himself by making the link projecting from the other bumper a momentary foot-rest. He might have swung his left foot out beyond the link, and rested it upon the bumper of car B, but for the pin which held the link. He did not, it appears, apprehend an immediate collision, nor greatly apprehend any collision at all; and if two or three seconds more had been allowed him, he would doubtless have alighted in safety. If he is to be justified at all in stepping upon the link, it must be because he was to use it only as a momentary resting-place, and did not apprehend the immediate ap-

proach of anything. Possibly he was guilty of contributory negligence, but we are not impressed that it was so clearly so that we should be justified in declaring it to be so as a matter of law. It is said, however, that if he had remained upon the car he would not have been injured, and that he was guilty of contributory negligence in not remaining there. But we cannot so hold. If the collision had been apparently imminent, it might have been a close question as to whether it would not have been negligence to attempt to dismount. But according to the undisputed evidence it was not apparently imminent, nor did the plaintiff know that a car or engine was approaching on his track. He apprehended that it might be so, and sought to place himself where he could see, and take care of his team if necessary.

One fact upon which the defendant places some stress remains to be stated. The plaintiff's son, a boy about 11 years old, was in the wagon assisting his father, and saw the car approach and gave no warning. It is insisted that he was guilty of negligence, and that his negligence is to be imputed to the plaintiff. But, in our opinion, this would be carrying the doctrine of implied negligence much further than the law justifies. Besides, he did not, probably, know that his father was going to dismount until he saw him dismount, nor observe where he placed his left foot until it was too late, if he observed it at all. The collision occurred before the plaintiff's right foot reached the ground.

We come next to consider whether there was any evidence of negligence on the part of the defendant, and we have to say that we think there was. Cars should not without warning be violently thrown back against detached cars that are in process of being unloaded. It is not, perhaps, entirely certain that any of the company's employees knew that car A was being unloaded. But it was placed where it was for the purpose of being unloaded. The company's employees knew, or should have known, that it was liable to be in process of being unloaded, and the slightest observation would have revealed the fact that it was being unloaded.

It is insisted, however, that, even if it were true that the defendant became liable, the plaintiff is not entitled to recover, because he has seen fit to predicate the defendant's liability upon certain facts, and has not proved the existence of those facts. The plaintiff averred that he "was rightfully there," and "with the knowledge and consent of the defendants." It is insisted that the plaintiff has not proved either averment, and that it was necessary, to entitle him to recover, to prove both. But, in our opinion, it was sufficient if the plaintiff proved that he was rightfully there, and that the company was negligent even though it may not have known that he was there, and may not have expressly consented to his being there. If the plaintiff was rightfully there, the company owed him the duty of such care as is necessary for the safety of all per-

sons engaged as he was ; and it is not for the company's employees to close their eyes and excuse themselves by saying that they did not know that any one was being imperilled. That the plaintiff was, in fact, rightfully there appears to us to be clear. The car had been placed where it was for the purpose of being unloaded by the owner of the lumber ; and the owner of the lumber had sent the plaintiff to unload it.

It is said, however, that the defendant had a lien upon the lumber for freight, and that no one had a right to remove it until the lien had been discharged. There is evidence tending to show that the freight had not been paid. But it seems to be certain that the defendant, in its dealings with the Chicago Lumber Co., had not been strict in demanding the freight in advance. One Holmes, the representative of the Chicago Lumber Co., testified in these words : " I usually paid when the freight bills were presented ; sometimes I got the lumber before the bills were presented, and sometimes afterwards." But we do not attach very much importance to this evidence. The transaction was peculiar. There was other evidence showing, we think, conclusively that the lien was waived. The lumber had been consigned to one Deitz. He sold it on the car to one Mott, and the defendant, by direction of Deitz, notified Mott of the arrival, and Mott receipted for the lumber and sold the same to the Chicago Lumber Co. Deitz remained liable for the freight, and paid it a few days later. We think that taking from Mott a receipt for the lumber was, under the circumstances, a waiver of any claim of a lien.

2. It is assigned as error that the court misstated the issue. The instruction assailed is in these words : " Whether a particular act amounts to negligence or mismanagement is to be determined very largely from the manner in which it is done, and the circumstances surrounding and attending it. In determining this question with reference to the present case, the jury must consider the nature of the business in which the servants of the defendant were engaged at the time of the injury ; whether they knew or had any reasonable ground to believe that the plaintiff was in such position as that he was liable to be injured by the act that they were doing or were about to do ; whether any precaution was taken by them to avoid or prevent the injury ; whether the act done by them was, when done, under the circumstances under which they did it, calculated to cause an injury to one situated as plaintiff was situated at the time ; and the like circumstances." The counsel for the defendant, in criticising this instruction, say : " Whether or not the acts of defendant were negligent, was to be determined by proof of the averments made in the petition, and not by proof of something not averred, but heard of for the first time in the charge of the court." This criticism is based upon the idea that the jury should have been specially instructed that to justify a verdict for



the plaintiff they should be able to find that the plaintiff was rightfully at the place of the injury, and with the company's knowledge and the company's consent. But in our opinion it would have been error to so instruct. If the evidence had shown that the plaintiff was a trespasser, then it may be that the company did not owe him any duty, unless it had knowledge of his danger. On the other hand, as we have seen, if he was not a trespasser,—that is, if he was rightfully where he was,—the company did owe him a duty, and was responsible for negligence, even though it did not know he was there.

In our opinion the averments were fuller than was necessary. The essential averment, so far as the defendant's negligence and the plaintiff's freedom from negligence are concerned, is in these words: "While the plaintiff was thus upon said car as aforesaid, the defendant, through the negligence and carelessness of its agents and employees, and without giving the plaintiff any proper and due notice thereof, and time to move away from said car, began to switch, shove, push, and throw with their locomotive engine, in a careless and negligent manner, other cars back to and in the direction of the said car upon which the plaintiff was then and there employed and engaged as aforesaid, by reason thereof one of said cars thus thrown and pushed came in the direction of said car on which plaintiff was thus engaged, with great force and violence; and while said car was so in motion, the plaintiff, using due care and caution on his part, attempted to make his escape from said car on which he was as aforesaid, and in which he would be in danger by reason of the acts aforesaid, and said car thus thrown back struck a car standing on defendant's track a short distance from the aforesaid car, where plaintiff was employed as aforesaid, and pushed the cars together in a violent manner, and caught the right foot of the plaintiff between the draw-heads of the cars where he then was, . . . without any fault or negligence on his part." It was not necessary for the plaintiff to go further than this, and aver all the facts and circumstances tending to lead to the same conclusion, nor was it necessary for the court to instruct specifically upon unnecessary facts and circumstances averred.

The court, in a previous instruction, had set out the plaintiff's claim substantially in accordance with the averments above set forth. It also had set out the defendant's denial, and had instructed in these words: "Under this issue the burden is on the plaintiff to establish the following ultimate facts: (1) That the injuries of which he complains were occasioned by the mismanagement or negligence of the servants or employees of the defendant; and (2) that he did not, by any negligence or want of care on his own part, contribute to the injury; (3) if he has established each one of these propositions by a fair preponderance of the evidence he is

entitled to recover ; if he has not done this, you must find for the defendants." The court then proceeded to instruct the jury in an explanatory way, and gave the instruction first set out above as the one objected to. In this instruction the jury was not expressly told that it was necessary for them to be able to find that the plaintiff was rightfully where he was, nor that they should be able to find that the defendant had knowledge of the plaintiff's whereabouts. But the essential grounds, it appears to us, had already been covered ; and, so far as the affirmative character of the explanatory instruction is concerned, the only proposition pointed out which it is claimed is erroneous, is that wherein the jury was instructed that they might consider whether the defendant "had any reasonable ground to believe that the plaintiff was in such position." It is said that there was not only no such issue, but that the issue was precluded by the averment that the defendant had actual knowledge.

In our opinion, if the instruction was erroneous by reason of the proposition in question, it was too favorable for the defendant. It was not necessary that the defendant should have reasonable ground to believe that the plaintiff, in particular, was engaged in unloading the car. It was sufficient if it had reasonable ground to believe that some one might be rightfully so engaged, and it was competent to show this under the allegations of negligence above set out ; nor was the plaintiff precluded from proving these allegations because he had alleged, in addition, that the defendant had actual knowledge.

3. Another instruction is assailed on the ground that it contains a misstatement of an issue. The plaintiff averred that "it became necessary for him to haul from the cars of the defendant certain lumber that had been transported to some person who sold the same on the defendant's track to the plaintiff's employer." The court stated to the jury that the plaintiff "alleges that in the course of his employment it became his duty to remove certain lumber which defendant had transported for his employer." It is said that there was a misstatement as to the party for whom it was alleged that the lumber had been transported. But the question as to whom the lumber was originally transported for was not an essential one. The plaintiff's employer had become entitled to it by purchase on the track. That was the essential fact. The variance between the plaintiff's allegation and the instruction appears to us to be wholly immaterial.

4. The court gave an instruction in these words: "If the cars between which the plaintiff was injured, at the time he attempted to climb down between them, stood at some distance apart, and there was no reason to apprehend that they were about to be pushed together, the act of putting himself between them cannot be negligent." The defendant complains of this instruction be-

cause the specific negligence insisted upon did not consist so much in putting himself in a general way between the cars, as in resting his foot where it was liable to be caught. The defendant contends that it is not necessarily negligence to put one's self between cars which are about to be pushed together, and the implication of the instruction is that it would be. But if this is so, then the instruction is too favorable for the defendant. Again, if the jury felt controlled by the implication, they must have found that the plaintiff had no reasonable ground to believe that the cars were about to be pushed together; and if he had not, he could not be said to be negligent in using the link as a momentary foot-place in stepping to the ground. We do not see how an instruction could have been drawn upon this point that would have been satisfactory to the defendant, unless it were to the effect that it is negligence in dismounting from a car to step upon a link projecting from the draw-head of a dead car near by, even as a momentary resting-place, and when there is no reasonable ground for believing that the car is to be disturbed, and where the character of the ground and other circumstances are such as to seem to make that mode of dismounting the safest. In our opinion the instruction given is not erroneous.

The views which we have expressed cover, we think, substantially the errors assigned and argued, and the judgment must be affirmed.

**Duty of Railroad Company to those Loading or Unloading Cars.**—A railroad company is bound to exercise active diligence to prevent injury to those who are lawfully at work upon its track or about its premises engaged in loading or unloading cars, or other legitimate employment. *Barton v. New York, etc., R. Co.*, 56 N. Y. 660; *Stinson v. New York, etc., R. Co.*, 32 N. Y. 333; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *Haley v. New York, etc., R. Co.*, 7 Hun (N. Y.), 84; *Baltimore, etc., R. Co. v. State*, 33 Md. 542; *McWilliams v. Detroit, etc., Mills Co.*, 31 Mich. 274; *Union Pacific R. Co. v. Harwood*, 15 Am. & Eng. R. R. Cas. 494.

**How Far such Parties Bound to be on their Guard.**—Such parties have a right to rely to a certain extent upon the protection of the railroad company, even if they are so engrossed in their work as not to heed the approach of trains. *Schultz v. Chicago, etc., R. Co.*, 44 Wisc. 638; *Goodfellow v. Boston, etc., R. Co.*, 106 Mass. 461; *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395.

But see *Besel v. New York, etc., R. Co.*, 70 N. Y. 171; *Valtez v. Ohio, etc., R. Co.*, 85 Ill. 500; *Illinois, etc., R. Co. v. Weldon*, 52 Ill. 290; *Fletcher v. Boston, etc., R. R. Co.*, 1 Allen, 9; *Chicago, etc., R. Co. v. Clark*, 11 Ch. L. N. 11. In all of which cases contributory negligence was imputed to parties engaged as above.

**Dangerous Positions Designated by Company's Servants.**—Persons engaged in loading and unloading freight have a right to occupy any position designated by the company's agent, no matter how perilous, and may rely upon the company performing its duty as to them. *Alleghany Valley R. R. Co. v. Findley*, 6 Cent. L. J. 276; *Newson v. New York, etc., R. Co.*, 29 N. Y. 383; *Foss et al. v. Chicago, M. & St. P. R. Co.*, *supra*.

But see *Chicago v. Clarke*, 70 Ill. 276.

DAHL, Adm'r, etc.,

v.

MILWAUKEE CITY RY. Co.

(*Advances Case, Wisconsin. March 31, 1885.*)

Upon examination of the evidence in this case, *held*, that it was not conclusively shown, either that the driver of the street car which ran over and killed plaintiff's child was not guilty of negligence, or that the mother of the child was guilty of contributory negligence in leaving it in charge of its brother, 13 years old, while she went out to obtain family supplies, and that the court erred in not submitting these questions to the jury, and in directing a nonsuit.

APPEAL from County Court, Milwaukee County.

May 26, 1883, a daughter of the plaintiff, aged four years and four months, was run over by one of the cars of the defendant company at or near the intersection of Walnut and Tenth streets, in the city of Milwaukee, causing her death. The plaintiff has been duly appointed administrator of the estate of his deceased daughter, and brings this action to recover damages for such killing, alleging that the death of his intestate was caused by the negligence of the defendant, and of the driver of the team which drew such car. The cause was tried before the court and a jury, and at the close of plaintiff's testimony the court granted a compulsory nonsuit. A motion for a new trial was denied, and judgment against the plaintiff for costs was entered, pursuant to the nonsuit. Plaintiff appeals from such judgment. The testimony introduced on the trial tended to show the following facts: The plaintiff, with his family, consisting of his wife and six children, lived on the south side of Walnut Street, near its intersection with Tenth Street, and had resided there for several years. The plaintiff is a laboring man, and on the afternoon of the death of his child was at work away from home. His oldest son, aged 17, was at work in his house, up-stairs, making cigars. The next, aged 15, was at work in another portion of the city. Another son, Peter, aged 13, was at home. The mother, desiring to leave the house for the purpose of obtaining supplies for the family, took the deceased from the house and put her in the charge of Peter, who was sitting on the steps in front of the house, contiguous to the sidewalk on the south side of Walnut Street. The mother then went upon her errand. The little girl sat by the side of Peter on the steps, and he talked and played with her for a time. In a short time thereafter she was missing. Peter made immediate search for her in the house and upon the premises, and just as he returned to the

front of the house and called her, the accident happened. The car which ran over her was moving from the west on Walnut Street towards Tenth, on a descending grade, the team going at a brisk trot. The child was run over near the usual crossing of Tenth Street, on the south side of Walnut. There are double tracks of railway along Walnut Street. The child was going north, and was run over on the south track. The attention of the driver was partly diverted at the time in making change for a lady passenger, but he saw the child on the track a short distance ahead of his team and used efforts to stop the team, but did not succeed in doing so in time to save her.

The foregoing are the main facts which the testimony tended to prove. There was testimony of many other facts and circumstances having some bearing upon the questions of negligence involved in the case, but it is deemed unnecessary to state them.

Austin & Runkel for appellant.

Rogers & Mann and E. P. Smith for respondent.

LYON, J.—The record does not show whether the nonsuit was ordered because the judge thought there was evidence tending to show that the driver of the car was negligent, or because he was of the opinion that it was conclusively proved that those in charge of the child were guilty of negligence which contributed proximately to her death. The case must, therefore, be considered in both aspects.

1. In order to determine whether the driver was negligent, it is necessary to consider the grade of the track; the velocity with which the car was moving; the extent to which the crossing of Tenth Street is used as a thoroughfare by foot-men; the facilities which the driver had to see a child upon the track at that point, and whether he ought not to have seen the deceased approaching the track earlier; the weight that should be given to any circumstance which momentarily diverted his attention; and whether he did all that could reasonably be required of him, after he discovered the deceased on the track, to avoid the injury. Upon these, and perhaps upon other facts and circumstances, depends the solution of the question whether the driver was or was not guilty of negligence. Under such circumstances the law is thoroughly well settled that the question is for the jury. *Hill v. City of Fond du Lac*, 56 Wis. 242; *Nelson v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 320; *Knowlton v. Milwaukee City Ry. Co.*, 59 Wis. 278; s. c., 16 Am. & Eng. R. R. Cas. 330; *Hoppe v. Chicago, M. & St. P. Ry. Co.*, s. c., *supra*; and other cases in this court there cited.

2. Does the testimony prove conclusively that the mother of the deceased was negligent in leaving the child in the care of Peter during her temporary absence from her home? This question is solved in the negative by the case of *Hoppe v. Railway Co.*, *supra*,

which, in its facts bearing upon the question, is very much like this case. Indeed, if there is any difference between them, the proof of the contributory negligence of the mother in that case is stronger than it is here. Yet it is there held that the question of her negligence was for the jury. On the authority of that case, as well as of many other cases determined by this court, it must be held that it is not conclusively proved that the mother of the deceased was guilty of and negligence contributing directly to the death of her child. It was error, therefore, to nonsuit the plaintiff, and we must reverse the judgment for that reason.

The judgment of the county court is reversed, and the cause will be remanded for a new trial.

**Children Left in Charge of Other Children.**—When young children are left by their parents in charge of older children, it is ordinarily a question for the jury whether the parents have or have not exercised due care. The court will generally refuse to hold such conduct negligence as matter of law. *Mulligan v. Curtis*, 100 Mass. 512; *Lovett v. Salem, etc., R. Co.*, 9 Allen, 557; *Lynch v. Smith*, 104 Mass. 53; *Honegsberger v. Second Ave. R. Co.*, 2 Abb. App. Dec. 278; *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49; *Cosgrove v. Ogden*, 49 N. Y. 255; *Ihl v. Forty-second Street R. Co.*, 47 N. Y. 317; *Barksdull v. New Orleans, etc., R. Co.*, 23 La. Ann. 180; *O'Flaherty v. Union R. Co.*, 45 Mo. 70; *Chicago, etc., R. Co. v. Becker*, 76 Ill. 25; s. c., 84 Ill. 483; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 503; *O'Connor v. Boston & Lowell R. Corp.*, 135 Mass. 352; s. c., 15 Am. & Eng. R. R. Cas. 862.

**Duty of Drivers of Street Cars.**—As to the duty of drivers of street cars to avoid injury to persons on the highway see *Market St. R. Co. v. McKeever*, and note, *infra*.

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## MARKET STREET R. R. Co.

v.

McKEEVER.

(59 *California Reports*, 294.)

A party was driving a cart in the streets of a city on the track of a street railway. The horse being breathed stopped, and the party got out and stood by his head. Seeing a steam dummy of the railway company approaching, he leaped upon the cart and endeavored to whip up his horse. The dummy then struck the cart, killing the party. In an action to recover damages for his death, *held*, that the questions of negligence and of contributory negligence were both for the jury.

In an action to recover damages for causing the death of a party, the court instructed the jury that the measure of damage in such case is the pecuniary loss suffered by the parties entitled to the sum recovered, without any allowance for distress of mind; and that loss—the loss which the parties are in such a case entitled to recover—is what the deceased would have probably earned by his labor in his business or calling during the resi-



due of his life, and which would have gone for the benefit of his heirs or personal representatives, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditure. *Held*, the instruction was more favorable to defendant than the law justifies, inasmuch as the statute gives to the jury the power to assess such damages "as under all the circumstances of the case may be just."

**APPEAL** from a judgment for the plaintiffs, and from an order denying a new trial in the Superior Court of the city and county of San Francisco.

The court instructed the jury, in effect, that the rule in regard to contributory negligence was confined to cases where such negligence immediately or approximately or directly contributed to the result, and that if the deceased did not exercise ordinary care, and yet did not by the want of such ordinary care contribute to produce the injury, the plaintiff would be entitled to recover; that the deceased, and every other person in the exercise of ordinary care, was entitled equally with the defendant to drive upon or across the street in question, and that the defendant had not any rights superior to those of the deceased in that portion of the public street included between the track, except when its cars were actually thereon or moving over the same, subject to their right of way; that the mere fact itself, unaccompanied by other evidence that the deceased was upon the track of this company, was not of itself evidence of negligence on his part; and also to the effect stated in the syllabus. The instructions asked by the defendant and refused were to the effect that the jury, under the pleadings (which contain no allegation of special damages), should not allow anything for prospective or any damages that had arisen since the commencement of the suit or that might arise or result in the future from the death of the deceased; also that the ordinary earnings of the deceased could not be taken into account under the pleadings, as there was no allegation that he supported the plaintiffs or earned anything for their support; also that under the pleadings the plaintiff could not recover anything beyond nominal damages. The facts appearing in the evidence were substantially as follows: The deceased was driving his cart loaded with coal up Market Street, on the right-hand track of the defendant; his horse was gentle, but old, and a little touched in the wind, and (as one of the plaintiff's witnesses expressed it), "when he would get short-winded he would get stubborn, and when he did get stubborn you could not very easily handle him." That at the place where the accident occurred the horse had stopped, and deceased was standing at the near side of the horse, holding him by the head. Upon the approach of the dummy and cars of the defendant, deceased left the horse's head and jumped on the cart.

The subsequent occurrence is thus described by Mayor Kalloch: That the first thing which attracted his attention was a man on a

cart making a vigorous exertion to get his horse out of the way of a dummy that was coming down the hill. At that time the dummy was about twenty feet from the cart. The man on the cart was whipping his horse. Instantly, there was a collision, and he (Kalloch) got there a moment or two afterwards. Found the horse wedged in between the car and the dummy. That at the time he first saw the cart, it was backing toward the track, and he saw there would be a collision unless the team could be stopped. That just before the collision the horse's head was turned to the right, at a sort of right angle to the street. That the dummy struck the rear part of the cart, and the wheels acting like a pivot threw it around, so that the horse and thills were projected between the dummy and the car.

The foregoing statement is taken from the evidence of the plaintiff.

On the part of the defence, the employee of the defendant who was in charge of the dummy testified as follows: As he was coming down Market Street he saw a coal cart standing on the up-track, heading up the track, and did not think anything of it at first, because there was room for the train to pass. That as he got near them he slowed up a little, because there was only about two feet or such a matter, clear, and passing a team down grade as close as that, he generally did slow up a little. That the man was standing by the head of the horse—both man and horse still. The man stood in that position until the dummy was very close to him; then left the horse's head and jumped on the cart. That the horse did not seem to take any notice of the dummy until the forward end of it was almost even with his head. The horse's head was a little on one side. He was standing facing the other track a little, and when they got that near, the horse suddenly sheered off from the dummy. At the same time he sheered away, the cart ran back just in time for the dummy to catch the wheel. The dummy did not strike the cart very heavy. As soon as the deceased left the horse's head he (witness) put on the brake as hard as it could be put on, and reversed the engine. When the dummy struck the cart it "slewed" it around and gave it a jar. The horse staggered and swung around, so that his head came in the space between the engine and the car, and that brought the shafts of the cart right before the end of the car. When the dummy first struck the hub, the man fell off or dropped off. The dummy moved five or six feet after the collision. He could not have done anything more to stop in time. He had a steam brake; had the lever in his hand, and had the steam port partly open, so that his brake was on pretty heavy. He slowed down some when he saw the horse move; opened it wide open, and gave the steam brake a full head of steam, and had the other hand on the reverse lever, and pulled that back and reversed the engine up the hill. As the man stood by the

horse's head the dummy would have cleared the nearest point of the car by two feet or such a matter.

The Assistant Superintendent of defendant, who was on the train at the time of the accident, testified as follows: Close to where the accident occurred he stepped on the rear step of the car, took hold of the brake to steady himself; looked out to see why they were slowing down. Saw the horse backing the cart. The dummy was nearly abreast of the horse's head, and the horse was in the act of backing into the dummy. He took in the situation at a glance and threw on the rear brake to help the engineer stop the train. The dummy struck the hub of the coal cart and swung it around nearly parallel with the train. The train moved on the down grade at the time it struck—passed it a little, and when it swung around parallel with the train the deceased was thrown clear over the horse and struck on the forward dashrail of the car and fell between the dummy and the car. The horse swung around and was with his fore feet on the front platform of the car. After they saw the danger there could be nothing more done than was done to stop the train.

H. S. Brown, J. E. Foulds, and Creed Haymond for appellant.

Edward P. Cole for respondents.

THORNTON, J.—This is an action to recover damages for the death of Daniel McKeever, caused by the neglect of the defendant. The action is brought by the heirs of the decedent under section 377 of the Code of Civil Procedure. There was verdict and judgment for plaintiff, and a motion by defendant for a new trial, which was denied. From the judgment and order denying a new trial, this appeal was prosecuted by defendant.

It is contended that the evidence is insufficient to justify the verdict. We have examined the evidence, and are of opinion that the point is not tenable. There is a substantial conflict in the testimony on material points, and, therefore, upon the well-settled rule of this and other courts pronounced in hundreds of cases, we cannot disturb the verdict. The testimony consists of a series of circumstances, from which the jury are to find on the issue of negligence. The jury under such circumstances are to make such inferences from the testimony as legitimately and justly follow, on which to base their verdict. They are not only to find the facts, but the inferences from them. The evidence is not of that character which presents a mere question of law. *Fernandes v. Sacramento C. R. Co.*, 52 Cal. 45; *Shafter v. Evans*, 53 Id. 33; *N. E. Glass Co. v. Lowell*, 7 Cush. 321; *Railroad Co. v. Stout*, 17 Wall. 657, and cases there cited; C. C. P. §§ 1957, 1958, 1960. The same remarks apply to the alleged contributory negligence of

the deceased, Daniel McKeever. See cases just cited, and particularly *Fernandes v. Sacramento C. R. Co.*, 52 Cal. 45.

We find no error in the record. We perceive nothing in the charge of the Court, or in any of the instructions given, in conflict with the rules laid down in *Adolph v. Cent. P. N. & E. R. R. Co.*, 76 N. Y. 530. See *Shea v. P. & B. V. R. R. Co.*, 44 Cal. 427; *Railroad Co. v. Gladmon*, 15 Wall. 401.

The charge of the Court and the instructions given were more favorable to the defendant than the law justifies, inasmuch as the statute gives to the jury the power to assess such damages "as under all the circumstances of the case may be just." C. C. P. § 377; *Matthews v. Warner's Adm.*, 29 Gratt. (Va.) 570; *Balt. & O. R. Co. v. Noell's Admr.*, 32 Id. 403-4; *Beeson v. Green Mountain G. M. Co.*, 57 Cal. 20.

The requests of defendant were properly refused.

The judgment and order denying a new trial are affirmed.

SHARPSTEIN, J., and MORRISON, C. J., concurred.

**Purpose of Note.**—We desire to present to our readers in this note a compilation of the authorities relative to the duty of street-car companies to avoid injuries to other vehicles and pedestrians. The principal case, it will be observed, is not precisely on this point, as the car in question was there operated by steam. As the subject of the note is, however, an interesting one, and as no collection of authorities on the point has heretofore appeared in our series, we deem it best to embrace this opportunity for publication.

**Relative Rights of Street-car Company and Public to Use of Track.**—The right of a street-car company to its track when laid upon a public street is not exclusive. The rights of the public are equal to those of the company. *Railroad Co. v. Gladmon*, 15 Wall. 401; *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170; *Albert v. Bleecker St. R. Co.*, 2 Daly, 389; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Barksdull v. New Orleans, etc., R. Co.*, 23 La. Ann. 180; *Mentz v. Second Ave. R. Co.*, 3 Abb. App. Dec. 274.

The cars of the street-car company have a preferential right to the use of the track. *Adolph v. Central, etc. R. Co.*, 65 N. Y. 554; *Shea v. Potiero, etc., R. Co.*, 44 Cal. 414; *Chicago and West Div. R. Co. v. Bert*, 69 Ill. 388.

The following early cases are to the effect that a street-car company has an exclusive right to the use of its track. *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. 314; *Barker v. Hudson, etc., R. Co.*, 4 Daly, 274; *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380.

**Duty of Street-car Company Generally.**—The measure of duty on the part of the railroad company to avoid injury to pedestrians and other vehicles is the same required on the part of other persons driving conveyances in the public street. If they do not fulfil their duty they will be held liable. *Unger v. Forty-second St. R. Co.*, 51 N. Y. 497; *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1; *Baltimore, etc., R. Co. v. McDonnell*, 43 Md. 534; *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236; *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Bulger v. Albany R. Co.*, 42 N. Y. 259; *Citizens' Street R. Co. v. Casey*, 56 Ind. 396; *Kelly v. Hendrie*, 26 Mich. 255; *Lawrence v. Pendleton St. R. Co.*, 1 Cinn. S. C. 180; *Button v. Hudson, etc., R. Co.*, 18 N. Y. 248; *Phila. City Pass. R. Co. v. Henrice*, 92 Pa. St. 431; s. c., 4 Am. & Eng. R.

R. Cas. 544; *Maschek v. St. Louis R. Co.*, 3 Am. & Eng. R. R. Cas. 38; *Etherington v. P., P. & C. I. R. R. Co.*, 4 Am. & Eng. R. R. Cas. 617; *Dahl, Adm'r, v. Milwaukee City R. Co.*, supra.

In some cases the company has been held to a stricter measure of duty. *Liddy v. St. Louis, etc., R. Co.*, 40 Mo. 506; *Johnson v. Hudson River, etc., R. Co.*, 20 N. Y. 65.

The mere fact that a street car is driven at a higher rate of speed than is allowed by municipal ordinance is not conclusive evidence of negligence. *Hanlon v. South Boston Horse-car Co.*, 2 Am. & Eng. R. R. Cas. 18.

**Duty of Company to Light Cars.**—In regard to the duty of the company to light up its cars at night the reader is referred to the following cases: *Johnson v. Hudson River, etc., R. Co.*, 20 N. Y. 65; *Shea v. Potiero, etc., R. Co.*, 44 Cal. 414; *Memphis City R. Co. v. Logue, Adm'r*, 15 Am. & Eng. R. R. Cas. 459.

**Duty of Street-car Company to Avoid Collision.**—When the driver of a street car sees another vehicle ahead either on the track or so close to it that if he drives ahead a collision is inevitable or highly probable, he should not drive on. If he does so and an injury occurs, the street-car company will be held liable. *Albert v. Bleecker St. R. Co.*, 2 Daly, 889; *Adolph v. Central, etc., R. Co.*, 65 N. Y. 554; *Cohen v. Dry Dock, etc., R. Co.*, 69 N. Y. 170; *Lynam v. Union R. Co.*, 114 Mass. 83.

**Duty of Persons Driving Vehicles on Street with Horse-car Line.**—A person driving a vehicle along a railroad track in a contrary direction to that in which the cars run may turn out on either side. *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380.

Where a driver of a vehicle attempts to pass a car at a point where there is an obstruction in the street, leaving but a narrow space to pass between the car track and the obstruction, he ordinarily does so at his peril. If injury ensues from a collision, the street-car company is not liable unless the car-driver has been guilty of negligence or wilful misconduct after becoming aware of plaintiff's perilous position. *Mercier v. New Orleans, etc., R. Co.*, 23 La. Ann. 264; *Barker v. Hudson, etc., R. Co.*, 4 Daly, 274; *Albert v. Bleecker St. R. Co.*, 2 Daly, 889. And see *Suydam v. Grand St. R. Co.*, 41 Barb. 375; *Wood v. Detroit City Street R. Co.*, 52 Mich. 402; s. c., supra.

A driver of a vehicle behind a street car is not bound to guard against the car slipping back upon him. *Cook v. Metropolitan R. Co.*, 98 Mass. 861.

**Duty of Pedestrians to Avoid being Run Over by Street Cars.**—As to the duty of pedestrians to avoid being run over by street cars, see the following cases: *Lynam v. Union, etc., R. Co.*, 114 Mass. 83; *Kelly v. Hendrie*, 26 Mich. 225; *Johnson v. Canal, etc., R. Co.*, 27 La. Ann. 53; *Shea v. Potiero, etc., R. Co.*, 44 Cal. 414; *Mentz v. Second Avenue R. Co.*, 3 Abb. App. Dec. 274; *Jetter v. New York, etc., R. Co.*, 2 Keyes (N. Y.), 154.

**Damages for Causing Death.**—The damages ordinarily recoverable for negligently causing the death of a person comprise the pecuniary value of the decedent's expectancy of life, all the attendant circumstances being taken into account. *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col. 1; *Kansas Pacific R. Co. v. Lundin*, 3 Col. 94; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Baltimore, etc., R. Co. v. Trainor*, 33 Md. 542; *David v. Southwestern R. Co.*, 41 Ga. 223; *Baltimore, etc., R. Co. v. Kelly*, 24 Md. 271; *Central R. & B. Co. v. Roach*, 8 Am. & Eng. R. R. Cas. 79; *Beems v. Chicago R. I. v. P. R. Co.*, 10 Am. & Eng. R. R. Cas. 658.

WOOD

v.

DETROIT CITY STREET RY. CO.

(52 *Michigan Reports*, 402.)

It is gross negligence to drive upon a street railway track in front of an approaching car without looking around until the car runs into one's vehicle; and it is a wrong not only to the railway company, but to persons riding in or waiting for the car, to wilfully obstruct its progress in this way when there is nothing to hinder one from getting off the track.

In trespass against an employer for an injury caused by the act of his servant, it is for the jury to decide whether the act was wilful or careless; if wilful, the employer would not be answerable.

ERROR to Wayne County.

Plaintiff brings error. Affirmed.

John G. Hawley for appellant.

John C. Donnelly for appellee.

COOLEY, C. J.—This is an action for personal injuries alleged to have been caused by the driver of the defendant negligently causing his car to run against the vehicle of the plaintiff, as he was driving along one of the streets of Detroit.

The plaintiff was sworn as a witness in his own behalf, and he also called the driver as his witness. After hearing both stories, the circuit judge ruled that there was nothing to go to the jury, and directed a verdict for the defendant. The plaintiff brings error.

According to the plaintiff's story, he was driving a one-horse vehicle along the street on one side of the defendant's tracks when he encountered obstructions and turned towards the tracks so that his right-hand wheels were over the rails. He did not look behind him to see if a car was coming until he felt something strike the rear wheel. He then looked around and saw it was the street car, and the driver, as he says, "motioned me with one hand to go on or he would knock a wheel off me. I laughed at him and said, 'You better not knock off more than one or two of them or somebody will have to pay for them.' He kept on motioning to get out of the way. I told him I could not get over those wagons and I was not going to try, but I would get out of his way just as soon as ever I could. I kept on. There was a number of wagons standing on that side of the street, loaded with brick, and three or four or five of them with the rear ends of the wagon out on the street further than the fore end, which brought the rear end of these wagons very near the car track, so that I had to get with the wheels on the right-hand side of my wagon partially



onto the track, and some places it got off the track, and some places I had to get right out pretty well over the track."

Up to this point the plaintiff was not only in fault, but he was the only party in fault. He had driven upon the track in front of an approaching car without looking around until the car had come in collision with his vehicle. This was gross carelessness on his part. But further on his evidence shows that the other side of the track was entirely unobstructed, and that there was nothing to prevent his crossing at once and allowing the street car to proceed on its way. The car had come to a stand-still on the first collision, and the plaintiff's conduct in maintaining his ground and responding to the driver's request that he should get out of the way by a laugh and a threat, was not only a wrong to the defendant, but also to any persons who might then be riding in the car or awaiting its coming.

But the plaintiff further testified that as he was leaving the track the driver called out: "God damn you, I can smash you anyhow," and that he let go the brake and the car almost instantly struck the plaintiff's wagon and threw it over, inflicting the injury complained of. The inference from this might be that the driver purposely, and in the anger excited by their altercation, ran his car against the plaintiff's wagon; and if the action had been brought for the trespass, it might become necessary to decide whether, under cases like *Wright v. Wilcox*, 19 Wend. 343, the defendant would be responsible. In that case it was decided that where the servant wilfully drove his master's conveyance over a third person and injured him, the trespass was that of the servant, for which the master was not liable. The case was followed in *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480: s. c. in error, 2 N. Y. 479, where the master of a vessel had purposely run the vessel into another; and in *Illinois Cent. R. R. Co. v. Downey*, 18 Ill. 259, where the engineer upon a railroad purposely ran his engine over live-stock. Also in *De Camp v. Railroad Co.*, 12 Iowa, 348, and many other cases. The general principle that the master is not liable for his servant's trespasses is familiar, and was recognized by this Court in *Chicago, etc., Ry. Co. v. Bayfield*, 37 Mich. 205. And if it were important to determine whether the injury was one purposely inflicted, and not one resulting from carelessness, the question would no doubt be one to be submitted to the jury. *Rounds v. Delaware, etc., R. R. Co.*, 64 N. Y. 129.

But this is an action in case, and the ground on which it is sought to charge the defendant is that its servant negligently drove the car against the plaintiff's vehicle. We are then to see whether, if negligence on the part of the driver is made out, or there is any evidence tending to prove it, the plaintiff himself, on his own evidence, does not appear to have been at least equally negligent. And we think he does. He knew very well he was in the driver's

way, and he had had ample time and opportunity to get out of danger if so disposed. That he was not disposed to allow the car to go on until it suited his pleasure to do so, is quite apparent; and there is abundant reason in his evidence for believing that he was purposely annoying the driver and delaying the car. If so, he cannot complain of the consequences.

The driver's testimony is quite different from the plaintiff's. He testified that when he first signalled the plaintiff to get off the track, the plaintiff made no effort to do so. The driver told him to get off or he would be run into, and he replied, "Run and be damned; he had as much right to the track as the driver had, and would get off when he pleased." He drove right along on the track, looking back and scolding the driver. Finally he turned off, and the car moved on, but he almost immediately turned again towards the track sufficiently to be struck by the car. If this evidence is true, the contributory negligence of the plaintiff was plain and very gross, and he must bear the consequences. Whether, therefore, we believe the plaintiff or the driver, the ruling of the circuit judge was well warranted.

The judgment must be affirmed with costs.

The other justices concurred.

**Street Cars Have Preferential Right to Use of Track.**—Cars belonging to street-car companies have a preferential right to the use of the car track. *Shea v. Potiero, etc.*, R. Co., 44 Cal. 414; *Chicago W. Div. R. Co. v. Best*, 69 Ill. 388; *Adolph v. Central, etc.*, R. Co., 65 N. Y. 554; and see *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380.

**Duty of Person Driving Vehicle in Public Street to Avoid Collision with Street Car.**—Upon the question of the duty of persons riding along the public street to exercise care to avoid a collision with a horse car, see the following authorities: *Mercier v. New Orleans, etc.*, R. Co., 23 La. Ann. 264; *Albert v. Bleecker St. R. Co.*, 2 Daly, 389; *Barker v. Hudson, etc.*, R. Co., 4 Daly, 274; *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380; *Suydam v. Grand St. R. Co.*, 41 Barb. 375; *Cook v. Metropolitan R. Co.*, 98 Mass. 361.

**General Reference.**—For a full collection of the authorities relative to accidents occasioned by the operation of street cars, see *Market Street R. R. Co. v. McKeever*, and note, *supra*.

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BOWEN

*v.*

DETROIT CITY STREET RY. CO.

(*Advance Case, Michigan. September 23, 1884.*)

A street railway company is bound to exercise such care and diligence in clearing its track of snow as not to interfere needlessly with the safety and convenience of those lawfully using the street; and if an extraordinary snow-fall takes place, it must make extraordinary efforts to dispose of it.

In an action for an injury caused by obstructions which, in the first instance,

are lawfully in the street, but which defendant is bound to remove as speedily as possible, it is not necessary to allege that they were left there for an unreasonable time, since the offence of leaving them there relates back so that it becomes unlawful from the beginning; and the time necessary for their removal is matter of justification and defence.

ERROR to Superior Court of Detroit.

Otto Kirchner for plaintiff.

Brennan & Donnelly for defendant.

CHAMPLIN, J.—The defendant is a corporation operating about 18 miles of street railway in the city of Detroit. One of its lines is upon Woodward Avenue, which consists of a double track. The ordinance under which it is permitted to run and operate its railway requires that it shall keep its track clear from snow. To do this expeditiously it uses Day's improved scraper, which is so constructed as to force the snow accumulated on its tracks to the side thereof to a distance of about six feet, and attached to the scraper, or snow-plough, as it is sometimes called, is a lever extending beyond about four feet, which serves to level down the ridge of snow thrown out by the scraper. This lever is adjustable, and can be raised or lowered. It usually passes about 12 inches above the ground. In ordinary snow-storms this apparatus so disposes of the snow that no inconvenience is occasioned to the public travel.

On the night of February 2, 1883, a severe snow-storm set in, and continued to fall until the night of the 3d. The snow was very damp, mixed with rain, and packed so firmly when removed by the snow-plough that the leveller failed to distribute it; and it was left in ridges on either side of the tracks, varying in height from two to three feet. On the third the weather turned cold, and by 3 or 4 o'clock it froze very hard, which had the effect to completely coat these ridges with ice. On Monday, the 5th, the defendant endeavored to level down these ridges by taking a large stick of timber loaded with iron, and hitching spans of horses to each end, and so break them down, but without success. It then took a large plough it had for grading streets, and that broke them up in such large lumps that it was more dangerous than to let them remain as they were, and nothing more was done to remove them. The plaintiff resided at No. 1095 Woodward Avenue, and on the evening of the 6th of February, 1883, he was proceeding along Woodward Avenue with his son in a sleigh, his team being driven by his coachman toward his home. There was not sufficient room for teams to pass each other between the ridge of snow above described and the curb-stone. On reaching a point opposite the residence of Mr. Farrington, a grocery delivery wagon was standing in the passage-way between the ridge and the curb. To pass this wagon, the driver crossed over the ridge to the street-car tracks, and continued on in the rear of and following one of defendant's

cars, until it stopped for some cause, and plaintiff's team passed around the car in the space which had been cleaned of snow, and proceeded on until they were about to meet another car coming from the opposite direction, when, at the intersection of Warren with Woodward Avenue, the driver again attempted to cross the ridge to the drive-way between it and the curb; and in crossing the ridge at this point the sleigh upset, the persons in it fell out, and the horses ran away. The horses and sleigh were injured; and plaintiff brought this action to recover his damages, which, he claims, were occasioned by the act of defendant in creating these ridges of snow. The declaration in the case does not allege that the act of defendant was unlawful or even wrongful; nor does it aver any duty owing by defendant to the public or to plaintiff, nor negligence in the discharge of any duty. The defendant insists that removing the snow from its tracks in the manner shown by the testimony was a lawful act, and properly performed, and that the only possible ground upon which the defendant could be made liable would be because it did not remove the ridges within a reasonable time; and that there can be no recovery in this case under the declaration, because there is no averment that defendant neglected to remove the ridges of snow within a reasonable time. On the other hand, the plaintiff's contention is that the ridges constituted a nuisance in the public street, and that the defendant is liable for all damages sustained by the plaintiff in consequence of placing them there. It may be considered as settled at the outset that these ridges of snow constituted serious and dangerous obstructions in the street, which interfered with the safety of the public travel and use of the streets, and, unless authorized by law, were per se nuisances. But, if authorized by law, they cannot be considered nuisances.

Our attention has not been called to any statutory authority which expressly authorizes the defendant to cast the snow from its tracks into the adjacent street. The statute conferring authority upon street railway companies to incorporate and to use streets is embraced in chapter 95, How. St. They are authorized, with the consent of the corporate authorities of the city, under such rules, regulations, and conditions as such corporate authorities may prescribe, to construct, use, maintain, and own a street railway for the transportation of passengers in and upon the line of the streets. In constructing the railway they are required to conform to the grade of the streets established by the corporate authorities, and to lay the track in such mode and with such kind of rail, and to keep the railway and that part of the street and pavement within and adjacent to the track in such condition and state of repair as prescribed and provided in the consent, grant, or agreement of the municipal authorities permitting the construction of the railway. The corporate authorities are authorized to prescribe, by ordinance or

otherwise, such rules and regulations in regard to the street railways as may be required for the grading, paving, and repairing the street, and to prevent obstructions thereon. It is made a misdemeanor, punishable by a fine not exceeding \$500 or imprisonment in the county jail not more than one year, for any person to wilfully obstruct, break, injure, or destroy any railway constructed or operated under that act, or any work, car, or building belonging to or in possession of the street railway company. There is nothing in this legislation that grants expressly to defendant any rights in the public streets except for constructing, maintaining, owning, and operating a street railway, and, by implication, such rights as are necessary to carry out the purposes of the grant, and no more of the street is granted than is necessary for that purpose. The franchises conferred are to be enjoyed in common with, and not in exclusion of, the public in the street for the uses and purposes of a highway. It is a matter of common notoriety that all railways must have a clear track in order to be operated at all, and that accumulations of ice and snow must of necessity be removed. And it may fairly be presumed that the legislature intended that companies organized under the act should keep their track in condition to be operated for the accommodation of the public at all seasons of the year, and that the street adjacent to the track might be used as a place of deposit for the snow that accumulated at certain seasons in such a manner as should not interfere with the rights of the public in the use thereof as a public highway, or of private individuals as owners of adjoining property. Although the legislature, by implication, granted the right to defendant to deposit the snow from its tracks upon the sides of the street, the company, notwithstanding, were bound to exercise the right conferred in a manner consistent with the rights of the community in the use of such streets, and it was also bound to exercise the highest degree of care to prevent injury to the persons and property of those affected by its acts. And while it is implied from the legislative grant to operate the railway that the snow may be deposited or thrown to the sides of the tracks, yet it will be observed that the method to be employed to accomplish the object of keeping the track clean is left with the company to determine; and where there are different methods which may be pursued by which the authority given may be exercised, by one of which the snow would be left in such a manner as to become a nuisance, and another not, that method must be adopted which will not create a nuisance. Every person having occasion to use the public streets for the purpose of travel or passage is entitled to feel that he is absolutely safe, while exercising ordinary care, against all accidents arising from obstructions in the street, and no one has the right, without special authority, to materially obstruct it or render its ordinary use dangerous. It is evident that the rights of the public and of the defendant may



both be secured in the reasonable use of the streets at the same time, and the railway company be enabled to discharge its duty to the public who rely upon or choose to patronize it, and the traveling public be enabled to use the streets with safety.

It is the duty of the company in removing the snow from its tracks to adopt such a mode as will not create obstructions in the streets to the detriment or danger of the public in the ordinary use thereof. If it can deposit the snow in the streets upon the sides of its tracks in such manner as not to interfere with the use of the street as a public highway, there appears to be no good reason why it may not adopt that mode of disposition, but in doing so it cannot be permitted to leave it in ridges or piles which would obstruct the streets, and make them unsafe or dangerous for vehicles to pass along or cross them. Its rights in this respect are subject and not paramount to the rights of the public to use the streets for the ordinary purpose of passage, and all acts which create obstructions to the use of the street by the public are unlawful. Was the manner adopted by the defendant to dispose of the snow a proper one? The testimony is that the means employed were the most expeditious and best adapted to the purpose of any known appliance, and the one in general use by street railway companies. It also appears from the testimony that ordinarily the snow was not left in ridges, but was levelled off and distributed so that it was not dangerous to the public in using the streets; but in this instance the snow was not levelled off, and remained in ridges, forming dangerous obstructions to travel. The defendant insists that this was not owing to any fault of defendant, but to the extraordinary nature of the storm, rendering it impossible for the machine to distribute the snow as it was forced from the track. If this was an extraordinary storm, the defendant was called upon to put forth extraordinary exertions, not only to clear its tracks, but to see that in so doing it did not create an obstruction in the street which would interfere with the public use thereof; and if obstructions were unavoidably made by the mode it employed to clear its tracks of snow, it became its imperative duty to remove such obstructions within a reasonable time, and if it failed to perform this duty it must be held responsible for the consequence to any one in the exercise of ordinary care who has suffered an injury thereby.

The question of reasonable time, in the absence of controversy respecting the facts, or where they are conceded, is one of law for the court to determine, and is defined to be "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires, in the particular case, should be done." In this case there was no controversy about the facts. The snow ceased to fall on the 3d, and the accident happened on the evening of the 6th. It is manifest that a reasonable time in which such ridges could and should have been reduced had elapsed before the



accident happened. Nothing was done by the defendant until the 5th, when an effort was made to level the ridges with a stick of timber, which was unsuccessful. Next a plough was used, which did not work satisfactorily, and then the effort was abandoned. Considering the dangerous nature of the obstructions, the defendant was reprehensibly negligent, and showed an utter disregard of the public welfare. It cannot be doubted that other and more ordinary and effective means were at hand, and should have been resorted to. It is unnecessary to mention them. They readily suggest themselves to persons of usual intelligence. The defendant neither removed the obstructions nor excused its want of diligence in removing them, and is justly responsible for the consequences of placing them in the street.

The defence insisted upon, that the defendant is not liable for placing the obstructions in the street, but, if at all, for not removing them in a reasonable time, is rather technical. If it should be conceded that it was lawful for the defendant to create the obstruction in the first instance, yet, if allowed to remain an unreasonable length of time, it became unlawful from the beginning, and, in an action to recover for the injury caused by the obstruction, it is proper for the plaintiff to base his right of action upon the obstruction as unlawful at the time of the injury, and it is not necessary to declare as for leaving it there an unreasonable time. It is matter of justification and defence. It is always a sufficient answer to say that the obstruction was in the highway only a reasonable time and for a lawful purpose. In coming to the conclusion they did, the jury must have found, under the charge of the court, that the plaintiff was in the exercise of ordinary care and did not contribute to the injury complained of, and that such injury was occasioned by the obstructions which defendant caused to be placed in the street and suffered to remain until the time of the accident. The charge of the court was, substantially, in accord with the views above expressed, and, under the facts, the plaintiff was entitled to recover, and the judgment is affirmed.

**Removal of Ice and Snow from Tracks of Street Railroads.**—The municipal authorities may prohibit the removal of snow from the track of a street railway at any and all times and places when, in their judgment, the public interest demands such prohibition. *Union R. R. Co. v. Cambridge*, 11 Allen (Mass.), 287.

When a street railway company has specially contracted to hold a city harmless from all damages arising from the failure of the company to keep the streets in repair, it will be liable to the city in the amount recovered in an action against the latter for an injury occasioned by its failure to keep the streets clear of snow. *Mayor, etc., v. Troy & Lansingburg R. Co.*, 8 Lans. (N. Y.) 270.

A street railway is liable in damages for an injury occasioned by the wrongful making and leaving by its agents of a pile of ice and snow in the highway. *Lee v. Union R. R. Co.*, 12 R. I. 383.

A railway company in the streets of a town cannot clear its track of snow

and place the snow so as to injure abutting property-owners either by obstructing the gutter or blocking access to the premises. Injunction will lie to prevent such injury. *Short v. Baltimore City R. Co.*, 50 Md. 78; *Prime v. Twenty-third Street R. Co.*, 1 Abb. N. C. (N. Y.) 68.

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RATHEURN

v.

BURLINGTON AND MISSOURI RIVER R. CO.

(16 *Nebraska Reports*, 441.)

In an action against a railroad company, the complaint, though very vague and indefinite in its terms set, forth in substance that the defendant made an excavation for its road near a certain street and left the same unguarded, and that the plaintiff while walking along said street fell into the excavation and was injured, although she had used due care. *Held*, that the complaint set forth a cause of action and was not demurrable.

Where the allegations of a petition are vague and indefinite, the remedy is by motion to make definite and certain.

Where the allegations of a petition are indefinite, but the language, when given its ordinary meaning, shows a liability of the defendant in favor of the plaintiff, a demurrer on the ground that the facts stated do not constitute a cause of action should be overruled.

ERROR to the District Court for Fillmore County. Heard below before Morris, J.

John P. Maule for plaintiff in error.

Marquett, Deweese & Hall for defendant in error.

MAXWELL, J.—This is an action to recover for injuries sustained by the plaintiff caused by the alleged negligence of the defendant. A demurrer was sustained to the petition in the court below and the action dismissed.

It is alleged in the petition, in substance, that the defendant is the owner of and operates a railway running through the corporate limits of the village of Fairmount, Nebraska; that in the construction of said railway it made "an excavation for its road-bed about 50 feet long and 10 feet deep in the deepest part, said excavation being within the corporate limits of said village of Fairmount, and running parallel with and between and close to North and South Railway streets in said village, North Railway Street being on the north side of said excavation, and South Railway Street being on the south side of the same, and Myrtle and Violet avenues running north and south and crossing said excavation;" that said streets were public highways and free to all persons to pass and repass at their pleasure; that the "defendant did

carelessly and negligently permit said excavation to remain unguarded and without any railing, guards, or other structure to prevent accidents at the sides of said excavation; neither did defendant fix any lights near the same, nor erect and maintain any bridges or crossings on the streets that crossed said excavation."

"That on the 4th day of December, 1882, the plaintiff, while lawfully passing along said South Railway Street, in the night-time and without any warning or knowledge of the existence of said excavation, and without any fault on his part, fell into said excavation at its deepest point and broke his left thigh," etc., the amount of damages claimed being the sum of \$10,000.

The petition is exceedingly vague and indefinite, but the remedy for these defects is a motion to make definite and certain. The language of the petition must be construed according to the liberal rules of the code, and so construed it amounts to this: That the defendant made an excavation ten feet in depth for its railway so close to South Railway Street, in the village of Fairmount, that the plaintiff, while walking along said street and exercising due care, fell into said excavation. If this is true with the other allegations, and the defendant had taken no precautions to prevent accidents, it would be liable.

The case of *Clary v. B. & M. R. R. Co.*, 14 Neb. 232, s. c., 11 Am. & Eng. R. R. Cas. 493, has no application to the facts of this case as stated in the petition.

It was strongly urged on the argument that where there is an omission to state a material fact in a petition—one necessary to show a cause of action—the presumption is that it does not exist. *B. & M. R. R. Co. v. York Co.*, 7 Neb. 487; *B. & M. R. R. Co. v. Lancaster Co.*, 4 Id. 307. The principle involved in the above cases may be illustrated by the case of an action against an indorser upon a promissory note, thus: Suppose the petition should fail to allege that demand of payment had been made of the maker at the time the note became due, or that notice had been given to the indorser. These are material facts to charge the indorser, and upon the failure to plead them the presumption is that they do not exist. But words actually used in a pleading must be construed according to their ordinary meaning, and thus construed the petition states a cause of action. It follows that the judgment of the court below must be reversed and the cause remanded.

Reversed and remanded.

The other judges concur.

BANKS

v.

HIGHLAND STREET RY. Co.

(135 *Massachusetts Reports*, 485.)

If a person in the employ of a telegraph company which has not obtained the writing from the mayor and aldermen required by the Gen. Sts. c. 64, § 3, specifying the places where the company may run its wires upon a highway of a city, while engaged in climbing a telegraph pole on such highway, with his back to the street, and carrying a telegraph wire attached to his person, is injured by a street-railway car running against the wire, which extends across the highway, and pulling him from the pole, he is doing an illegal act, which contributes to cause his injury, and precludes his maintaining an action therefor, unless the driver of the car recklessly and wantonly drives against the wire ; and § 5263 of the U. S. Rev. Sts. has no application to the case.

TORT for personal injuries occasioned, on April 30, 1881, to the plaintiff, who was in the employ of the Western Union Telegraph Co., while engaged in climbing a telegraph pole on Columbus Avenue, in Boston, and carrying a telegraph wire attached to his person, by a car of the defendant corporation running against the wire, which extended across the highway, and pulling the plaintiff from the pole. At the trial in the Superior Court, before Gardner, J., the jury returned a verdict for the plaintiff ; and the defendant alleged exceptions. The facts appear in the opinion.

J. Hewins for the defendant.

H. Wardwell for the plaintiff.

COLBURN, J.—It was not the purpose of the U. S. Rev. Sts., § 5263, to deprive the States of the right to regulate, to a reasonable extent, the manner in which lines of telegraph shall be constructed over and along post-roads of the United States. *Pensacola Telegraph v. Western Union Telegraph*, 96 U. S. 1. There is no conflict between the Gen. Sts. c. 64 (Pub. Sts. c. 109) and the statute of the United States ; and, so far as any question arises in this case, that statute may be disregarded. The Gen. Sts. c. 64, § 2, provide that incorporated telegraph companies “ may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads ; ” and § 3 provides that the mayor and aldermen shall give the company a writing, specifying, among other things, the “ height at which and the places where the wires may run. ” This writing is to be recorded in the records of the city. In this statute the word “ upon ” includes crossing a way by the wires.

As the telegraph company had no such writing, it had no right

to run its wires across Columbus Avenue, as the plaintiff was doing at the time of his injury. The wire, at least while looped across the street, so that it might be hit by passing carriages, was a nuisance, which any person lawfully travelling on the way, and incommoded by it, might remove. *Arundel v. M'Culloch*, 10 Mass. 70; *Wales v. Stetson*, 2 Mass. 143.

The plaintiff was carrying the wire, looped across the street, attached to his person, and with his back to the street, so that, if the wire was struck, he would be pulled from the pole which he was climbing. He was not only doing an unlawful act, but doing it in a manner peculiarly dangerous to himself. What the plaintiff was doing was not merely a condition; it was a direct contributory cause of his injury.

The car was lawfully passing upon the street, and could not continue its course without striking the wire. The driver of the car, when he saw the wire, had no right to drive on without care or concern for the consequences; but the defendant was not liable to the plaintiff for mere error of judgment on the part of the driver of the car.

The jury should have been instructed not only that the plaintiff was doing an illegal act, but that his illegal act contributed to his injury; and that he was not entitled to recover, unless he satisfied them that the driver of the car recklessly and wantonly drove against the wire.

Exceptions sustained.

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KOLSTI

v.

MINNEAPOLIS AND ST. LOUIS RY. CO.

(*Advance Case, Minnesota. May 31, 1884.*)

The rule that a trial court need not charge the jury in the language of a request, if the propositions contained in it are fully and clearly stated in the general charge, followed.

Where the issue is negligence in the care of and manner of guarding a railroad turn-table, for the purpose of preventing children of tender years, having access to it, being injured, it is competent to prove that the fastenings to it were similar in character to those in general use on such turn-tables.

A witness who has been employed in railroad work twenty-five years, part of the time in charge of a turn-table, is competent to answer the question, "Would it be practicable to lock or fence turn-tables?"

APPEAL from an order of the district court, Hennepin County, denying motion to set aside verdict and for new trial.

Babcock & Davis for appellant.

J. D. Springer for respondent.

GILFILLAN, C. J.—This was an action for injuries to plaintiff, a child of eight years, received while playing on a “turn-table” belonging to and situated on the ground of defendant. The complaint makes a case similar, in its essential features, to that of *Keefe v. M. & St. P. Ry. Co.*, 21 Minn. 206. It is doubtful if, within the rule laid down in that case, a verdict for the plaintiff could have been sustained on the evidence introduced at the trial. But the case was submitted to the jury, who found for defendant. The court, in its general charge, very fully and clearly defined the rule laid down in the case referred to as the one applicable to this case, and, that rule being the utmost that plaintiff could claim on the evidence, it was no error in it to refuse to state it in the language chosen by plaintiff in his fifth request. The propositions therein contained (so far, at least, as they were unexceptionable) were stated in the general charge, and in terms less liable to be misunderstood than those employed in the request. It was also no error to give defendant’s first request, that “the defendant was not required to so fasten or secure the turn-table in question that boys like the injured boy could not displace such fastenings and put the table in motion.” The contrary of this would impose upon the defendant more than the ordinary care required of persons who have upon their own premises dangerous machines, attractive to and open to the access of children of tender years; would, in effect, make it an insurer of the safety of such persons. On the trial the court permitted defendant, against the objection of plaintiff, to prove that the fastenings to this turn-table were similar in character to those in general use on turn-tables. This is alleged as error. The authorities are not entirely agreed as to whether evidence of that character is admissible on the question of negligence or due care. But it may be regarded as settled, in this State, in the affirmative by the case of *Kelly v. S. M. Ry. Co.*, 28 Minn. 98; s. c., 6 Am. & Eng. R. R. Cas. 264. When the question is, did a person use ordinary care in a particular case, the test is the amount of care ordinarily used, by men in general, in similar circumstances. If it be matter of common knowledge, such amount of care needs no proof—the jury take notice of it. But if it pertain to some special business which the jury cannot be supposed to know, it may be proved.

To the question put by defendant to one of its witnesses, “whether it would be practicable to lock or fence turn-tables,” the only objection urged here is that the witness was not an expert. The question calls for a fact, rather than an opinion; but if it were the latter, the witness, who had been employed in railroad work twenty-



five years, part of the time with a turn-table under his charge, showed himself competent to give one.

Order affirmed.

**Defective Turn-tables.**—Upon the subject of injuries resulting from defective turn-tables, consult the following authorities: *Stout v. Sioux City & Pacific R. Co.*, 2 Dill. C. Ct. 294; *Koons v. St. Louis & Iron Mt. R. R. Co.*, 65 Mo. 592; *Durgin v. Munson*, 9 Allen, 396; *St. Louis, V. & T. H. R. R. Co. v. Bell*, 81 Ill. 76; *Evansich v. Gulf, Col. & S. F. R. Co.*, 6 Am. & Eng. R. R. Cas. 182; *East Tenn., Va. & Ga. R. R. Co. v. Toppins*, 11 Am. & Eng. R. R. Cas. 222; *Fitts v. Cream City R. Co.*, 15 Am. & Eng. R. R. Cas. 462.

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## CASE

*v.*

## CHICAGO, R. I. AND P. R. R.

(*Advance Case, Iowa. October 22, 1884.*)

In an action for personal injury caused by reason of a car-door falling upon plaintiff while he was standing on a street where a freight train of defendant containing the car was passing, where it does not appear how the door happened to fall except that the fastenings had become insufficient, probably by wear or breakage, mere proof of the accident and its attending circumstances does not raise a presumption of negligence on the part of the defendant, and cast the burden of rebutting such presumption upon it; but plaintiff must prove that the defect causing the accident came to the knowledge of defendant, or existed for such a length of time that knowledge should be presumed.

APPEAL from Polk circuit court.

Action for personal injury. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

Wright, Cummins & Wright for appellant.

Baylies & Baylies for appellee.

ADAMS, J.—The injury occurred by reason of a car-door falling upon the plaintiff while he was standing upon a street in the city of Des Moines, near where the defendant's freight train containing the car was passing. As to how the door happened to fall there is no direct evidence whatever. It is manifest that the fastenings had become insufficient, and this probably occurred by reason of wear or strain or breakage, but further than that it is impossible to make any inference. The court gave an instruction in these words: "When the accident is one that ordinarily would not have happened had the defendant exercised ordinary care, proof of the accident and its attending circumstances raises a presumption

of negligence on the part of the defendant, and the burden of proof is then cast upon it to rebut the presumption." The giving of this instruction is assigned as error.

The instruction we think cannot be approved. The case, so far as we can see, is an ordinary one, and falls under the ordinary rule that where the defendant is charged with negligence in the use of a structure which has become defective, it is incumbent on the plaintiff to prove that the defect came to the knowledge of the defendant, or existed for such a length of time that knowledge should be presumed. *Gandy v. C. & N. W. R. Co.*, 30 Iowa, 420; *McCummons v. C. & N. W. R. Co.*, 33 Iowa, 187; *Aylesworth v. C., R. I. & P. R. Co.*, 30 Iowa, 459; *Perry v. Railroad Co.*, 36 Iowa, 102; *Davis v. C., R. I. & P. R. Co.*, 40 Iowa, 292; *McCormick v. C., R. I. & P. R. Co.*, 41 Iowa, 193; s. c., 5 Am. & Eng. R. R. Cas., 474; *Losee v. Buchanan*, 51 N. Y. 476; *Garrison v. New York*, 5 Bosw. 497; *Hall v. Manchester*, 40 N. H. 410; *Hart v. Brooklyn*, 36 Barb. 226; *Thomp. Neg.* 1227.

The plaintiff relies upon cases which either involved contractual relation or danger which was so imminent as to call for unremitting attention, as where a heavy body is raised or lowered over a public way. The danger of a car door falling upon a by-stander was certainly not of this character; nor would it be practicable for a railroad company to give unremitting attention to the condition of every car owned by it or drawn into its service. The company may be allowed a little time to discover defects. Possibly the plaintiff would concede that this is so. His contention is, as we understand, that the instruction given is not inconsistent with such rule. Our attention is called to the fact that the instruction does not hold that proof of the accident alone raises, in such case, a presumption of negligence, but that proof of the accident and of attending circumstances does. In regard to this, we have to say that it cannot properly be held that attending circumstances, abstractly considered, constitute presumptive evidence of negligence. While there are attending circumstances in every case, they are not always such as to constitute presumptive evidence of negligence, and were not, so far as we can see, in the case at bar.

The plaintiff insists, upon the circumstances, that the defendant's train, including the defective car, was in motion, and passed on its route to its destination, and he was not allowed to inspect it, nor have it inspected by persons whom he could call as witnesses. It is possible, of course, that an inspection of the car might have revealed a long-standing defect, but we cannot presume that it would. Nor do we see any conduct on the part of the company, or any one representing it in the control of the train, that could be construed into an attempt to conceal evidence. It is not shown that the fact of the accident came to the knowledge of the conductor of the train or any one, except a brakeman. The plaintiff

walked away, and it does not appear that at that time the accident was regarded as serious even by the plaintiff himself.

Some other questions are discussed ; but, in the view which we have taken of the case, they cannot, we think, arise upon another trial. Reversed.

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GUDGER

v.

WESTERN NORTH CAROLINA R. R. Co.

(87 *North Carolina Reports*, 325.)

The plaintiff sues the Western North Carolina railway company for damages for personal injuries alleged to have resulted from its erection of an "engineer-stake," in a street of the town of Marshall, over which the plaintiff fell and broke his leg. *Held* that the wrong complained of is the personal act of those engaged in running the line for the proposed road, and, in law, the act of those by whose authority the work was done, and that the plaintiff has the right to elect to sue one or more of them, alone.

In the course of this proceeding, non-residents (assignees of the road) voluntarily become parties defendant, and ask for a removal of the case to the federal court. *Held*, that their motion was properly refused.

To entitle a party to such removal, under the act of Congress, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those on the other.

MOTION of defendants to remove the cause to the circuit court of the United States, heard at Fall Term, 1882, of Madison Superior Court.

The cause of action alleged in the complaint is the negligent and unlawful erection, in a street of the town of Marshall by the defendant company, of a stake against which the plaintiff accidentally struck his foot, and in falling broke the bone of his leg, and for this injury he seeks to recover damages.

The defendant in its answer admits its incorporation and organization under a law of the State, and says that the legal title to the corporate property remains in the State, while the equitable title thereto is vested in A. S. Buford, T. M. Logan and W. P. Clyde, assignees of W. J. Best, by virtue of a contract entered into between him and the State, and that they are necessary parties to the suit.

The answer then proceeds to explain that the engineer-stakes were placed in the street, in the course of a survey of the route for

the extension of its road, under authority conferred and as necessary in order to the construction thereof, and denies that it caused to be put up the stake against which the plaintiff alleges he came in contact, and sustained the injury complained of.

It is further stated that the plaintiff saw and knew of the placing of the stake at the curb-stone, near and in front of his residence, interfering neither with the use of the street nor side-walk, and if he stumbled against it, it was his own negligence alone that caused the injury, and the company is in no manner liable for the consequences.

It is not necessary to set out in greater detail the allegations contained in the pleadings, in order to show the nature and extent of the controversy between the parties.

The record states that at fall term, 1882, the said Buford, Logan and Clyde "are made parties defendant and filed their answer," but at whose instance, unless their own, does not appear. They also put in an answer alleging the same substantial matters of defence, and describing with minuteness of detail the proceedings whereby the former railroad property of the same name had come into their possession and under their control, under an assignment to them of the contract entered into with Best, and the interruptions and embarrassments that might ensue, in executing the contract for construction, through the recovery of judgment and its enforcement by the plaintiff against the franchise and property of the company.

At this stage of the proceeding, the three added defendants, citizens of other States than that of the plaintiff, file their petition for the removal of the cause to the circuit court of the United States, under the act of Congress in that behalf. The motion was refused, and they appeal to this court.

J. H. Merrimon and J. M. Gudger for plaintiff.

D. Schenck, F. H. Busbee and McLoud & Moore for defendant.

SMITH, C. J.—It is a matter of moment to the parties that a correct solution be reached of the inquiry, whether upon the case presented in the pleadings the defendants are entitled to an order of removal, or suspension of further action in the cause in the superior court, since, if it ought to have been, and is not transferred to the jurisdiction of the federal court, whatever proceedings may be thereafter had in the State court, are a nullity, and the progress of the cause is arrested by law at the point when the removal was demanded.

We have therefore carefully considered the act of Congress of March, 1875, as interpreted by the supreme court of the United States in *Barney v. Latham*, 103 U. S. 205; *Blake v. McKim*, Id. 386; and *Hyde v. Reeble*, 104 U. S. 407, with a view to ascertain

if the case made in the pleadings in the present action brings it within the scope and operation of the enactment, and entitles the defendants to an order of removal.

The action, divested of extraneous matter, is one of tort, and its object the recovery of damages sustained by the plaintiff, resulting from the negligence of the defendant company. No other person is charged with complicity in the unlawful act, if such there be, nor was it necessary for the plaintiff to pursue his remedy against all the wrong-doers.

His controversy is with, and his suit is against such party as he charges in the complaint with having placed the obstruction in the public street, and no other. If then the individual non-resident defendants come in and assume a common responsibility with the other defendant, while no recovery is asked against them, how can it be said that there has been constituted, in the words of the statute, "a controversy which is wholly between citizens of different States and which can be fully determined as between them" ?—that is, as declared by the court in *Barney v. Latham*, supra, "a controversy finally determinable as between them, without the presence of their co-defendants or any of them, citizens of the same State with the plaintiff," when in fact it is exclusively upon the pleadings between the plaintiff and the defendant originally sued, as to an imputed unlawful act of the latter, the source and ground of the claim to compensatory damages. The defendants who subsequently come in and become parties, assume a common responsibility with the company, if there be any liability resting upon either, for the act, but this cannot impair the plaintiff's right to seek his remedy and pursue it against the company if he chooses so to do.

The wrong complained of in putting up the stake is the personal act of those who were engaged in running the proposed railroad route, and in law the act of those by whose authority and in whose service the work was done, and the plaintiff has his election to seek his redress against one or more of them alone.

It would in our opinion be a perversion of the purposes of the act, and unwarranted by its words, to permit other wrong-doers, not sought to be made liable and against whom no complaint is preferred, to come in and assume an unnecessary liability for themselves, and under this pretext to withdraw the only controversy of the plaintiff's seeking from a rightfully attaching jurisdiction of the court.

As the case stands upon the complaint, all the defendants are united in resisting a recovery against the company, and the asserted and denied right to maintain the action is the sole subject matter in contest.

A controversy between opposing parties to an action grows out of conflicting allegations in the adversary pleadings, and none is made in the complaint against the non-resident defendants (volun-

tarily becoming parties), and no issue as to them can be eliminated therefrom.

"The suit then, as it stands in the complaint," remarks the chief justice in *Hyde v. Reeble*, "is in respect to a controversy between the parties as to the liabilities of the defendant on a single contract," and substituting tort for contract at the end of the sentence, the language is precisely adapted to the present case. "Neither do we think," he adds, "it [the cause] was removable under the second clause of the same section, on the ground that there was in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under this clause, there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different States from those on the other."

In our view the case presented is not one for removal under the act, and the application therefor was properly denied.

There is no error, and this will be certified to the end that the cause proceed in the court below. The appellants will pay the costs of the appeal.

No error. Affirmed.

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TUEBNER

v.

CALIFORNIA STREET R. Co.

(*Advance Case, California. November 28, 1884.*)

The maintaining and use on property adjoining plaintiff's, of a steam-engine for the purpose of propelling cars by means of a cable, by which use plaintiff's adjoining building was constantly shaken, plaster cracked, and premises covered with soot, besides a loud and continuous noise being produced, constituted a nuisance for which the street-car company was liable; and a license from the municipality to operate such road, and all machinery necessary thereto, was not a justification of such nuisance.

In an action to abate a nuisance, and for damages for injuries sustained, the fact that the nuisance has since been abated does not interfere with plaintiff's right to recover damages for injuries already sustained.

The measure of damages for injury by a nuisance is a question for the jury, and they may determine a reasonable sum as a proper compensation; it is not necessary for the plaintiff to prove the value of his injury.

DEPARTMENT 1. Appeal from the superior court of the city and county of San Francisco.

Harvey S. Brown and J. E. Foulds for appellants.

E. F. Preston for respondent.



MYRICK, J.—The action was brought to abate an alleged nuisance and to recover damages. The jury gave a verdict for the plaintiffs for \$1,000 damages, and from the judgment rendered therefor and an order denying a new trial, the defendant appealed.

The case is, in substance, as follows: The plaintiffs, owners of a lot of land near the corner of Larkin and California streets, in the city and county of San Francisco, had thereon two dwelling-houses (one occupied by the family of one of the plaintiffs, the other by the family of the other plaintiff), and on the rear of the lot a two-story building, in the lower story of which the plaintiffs carried on the manufacture of show-cases, the upper story being occupied by a tenant. The defendant constructed a street railroad along California Street, and, for the purpose of using steam as a motive power in propelling the cars, by means of a cable, constructed a building on the corner of the streets above named, which building adjoined the property of plaintiffs. This building was used in connection with the street railroad as a car-house, and had an engine and furnace, with a smoke-stack extending to a point 20 feet higher than plaintiffs' houses. Cars were elevated from one story to another by the aid of machinery. We quote substantially from the testimony of plaintiffs for the purpose of showing the case as presented by them to the court and jury:

"From the time the railroad commenced running, about February 1, 1878, to August 2, 1878, when this suit was commenced, we were annoyed by soot, and by the machinery, and the elevator running up and letting down cars. It shook the whole house; commenced about 7 o'clock in the evening, and continued until 10, 11, or 12 o'clock at night,—sometimes until 1 and 2; the noise was continuous during that time; there was a jarring and shaking of the building; the plastering was cracked some; the elevator sometimes shook the whole house; the soot came from the smoke-stack to our houses, and came in at the windows, and in the back-yard; in the morning I could clean up a whole pailful; if I lay my hand on the banisters, they are all black; we were troubled every day with soot; if I open the windows, the dust comes into the whole house; in the evening, sometimes when I am reading the paper, they would put the cars upon a small track; I would jump up, thinking it was an earthquake; the noise mostly is when they are elevating the cars; when the cars went in, there was shaking and soot that troubled us all the time; sometimes it shook the house so you would have thought it was an earthquake; as for the soot, it was not possible to clean the stairs or place; if you clean it four or five times, it would be the same thing over."

Besides a denial of the shaking, noises, and soot, the defendant pleaded its incorporation for the purpose of operating a street railroad along California Street with endless ropes and stationary steam-engines, and that it had authority from the board of super-

visors of the city and county so to operate its road, and that all the structures and machinery were necessary to that end, and were properly constructed and operated. When the defendant offered the orders of the board of supervisors in evidence, the court sustained the plaintiffs' objection thereto. The defendant assigns this ruling as error, on the ground that if it had the legal right to run its cars along the street, the acts complained of could not constitute a nuisance, because the doing of that which is lawful cannot be a nuisance. If this position be correct, in its application to this case, the court erred. There is no doubt that the municipality may grant the right to run cars along streets, to be drawn by horses or propelled by steam. The annoyances complained of were not the immediate result of the running of cars; they were caused by the stationary furnace and machinery of the defendant on its own premises. If the defendant had the right to operate its furnace and machinery in the manner and with the result detailed, the orders of the board of supervisors would not add to such right. The object of the testimony offered was to show that the defendant, in operating its road, was doing a legal act, and to claim that, as a stationary engine was necessary, all results to follow the reasonable use of the engine and its appliances were also legal.

To sustain the ruling of the court it must be conceded that the defendant had a legal right to run its cars on the street, propelled by the use of steam-power. The question, then, is presented: Had the defendant the right to use its own property (the lot at the corner of the streets), in a lawful business, in such a manner as to produce the results complained of? Any person may use his own property in such lawful manner as to him may seem fit, having reference always to the right of others to use their property. A person may not use his own property even in and about a business in itself lawful, if it be used in such a manner as to seriously interfere with another in the enjoyment of his right in the use of his property. It is declared by the Civil Code (section 731) that "anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action," and damages may be recovered. It is said by Cooley, in his work on Torts, 600, that "where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences, the jar of machinery may constitute a serious nuisance, injurious, not to comfort merely, but to health; it is usually increased also by smoke, soot, etc." If the smoke or dust, or both, that rises from one man's premises and passes over and upon those of another, causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance. But the inconvenience must be something more than mere fancy—mere

delicacy or fastidiousness; it must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober, and simple notions." If a business be necessary or useful, it is always presumable that there is a proper place and a proper manner for carrying it on. It can hardly be said that is a lawful business which cannot be carried on without detriment to surrounding people. Some classes of business constitute a nuisance per se; others may or may not create a nuisance, according as they shall be carried on. The keeping of a hotel or restaurant is a lawful and very necessary business,—equally so with running street cars; yet it could not be held that a person carrying on such business, or any other requiring a large consumption of fuel, could erect his chimney to a height that would discharge the smoke and soot into his neighbor's window. It is true, as urged by appellant, that persons preferring to live in cities, rather than the country, must accept many inconveniences,—probably all that naturally and necessarily flow from the concentration of populations; but that doctrine should not be carried too far. The law looks to a medium course to be pursued by each for the mutual benefit of all.

Applying these principles to the facts as presented by the plaintiffs, we are of opinion that it was competent for the jury to determine whether the defendant was carrying on its business in a proper manner; whether the acts complained of were substantially offensive to the senses of the plaintiffs, or obstructed them in the free use of their property, so as to interfere with their comfortable enjoyment of it. It may have been that a smoke-stack but 20 feet high would foul the plaintiffs' premises, and that one 40 feet high would not. It may have been convenient for the defendant to hoist its cars from one story to another, and yet not absolutely necessary; or it may be that the hoisting could have been done without causing a jarring producing actual discomfort or injury.

As said above, the municipality could grant a franchise for running cars along the street, but it could not grant a franchise to materially injure the plaintiffs in their property rights. The franchise which the defendant claimed to hold did not even assume to be for that end. We are aware of the decisions that where a franchise has been granted for the running of steam-cars along a street, property-owners along the line must abide the natural results of a reasonable and proper exercise of the franchise; but we are of opinion that the reason of those decisions has no application here. The fact that the defendant had since the commencement of the suit (if such be the fact) remedied the evil complained of, would not interfere with plaintiffs' right to recover damages for injuries sustained before the commencement of the suit. It was not incumbent on the plaintiffs to prove their injury by value; it may have

been of trivial cost to sweep up a pailful of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value sustained by the jarring. It was for the jury to determine a reasonable sum to be proper compensation.

We have examined the points presented by appellant, and are of opinion that they are substantially covered by the foregoing. Judgment and order affirmed.

SHARPSTEIN, J.—I concur.

THORNTON, J.—I concur in the judgment. The evidence as to the amount in money of the damages accrued was very slight, yet as the damages found for the injury suffered are not excessive, I do not think the judgment should be disturbed for that reason. That the acts committed by the defendant constituted a nuisance is clear; nor were such acts either directly or indirectly permitted to be done by the express authority of a statute.

**Nuisance of Noise and Smoke.**—A railroad company may become guilty of maintaining a nuisance when it erects workshops or other buildings necessary for its purposes and uses machinery on them which creates noise, vibration, and smoke. *Fenwick v. East London R. Co.*, L. R. No. Eq. 544; *Randell v. Pacific R. Co.*, 65 Mo. 825; *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church*, 11 Am. & Eng. R. R. Cas. 15; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *Trustees of First Baptist Church v. Utica & Schenectady R. Co.*, 6 Barb. 813; *People v. Albany & Susquehanna R. Co.*, 57 Barb. 204.

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GULF, COLORADO AND SANTA FÉ R. R. Co.

v.

LEVY.

(*Advance Case, Texas. 1885.*)

A party is not entitled to recover damages for an injury to his feelings or mental anguish, occasioned by the non-delivery of a telegram, unless the non-delivery was occasioned by gross negligence.

Plaintiff's wife and child having died, he sent a telegram to his father requesting aid. The telegram was transmitted correctly and promptly to the town where the plaintiff's father lived, and three attempts were made in the course of the day to deliver it at his store, which was, however, found closed. No inquiry was made for him by any one. In suit brought by plaintiff for the mental anguish caused him by reason of the failure of his father to come to him: *held*, that there was no evidence of gross negligence, and therefore no right to recover.

The institution of suit is full compliance with a stipulation on a telegraph blank that any claim for damages shall be presented within sixty days.

APPEAL from Milam County.

Ballinger, Mott & Terry for appellant.

Heffly & Wallace for appellee.

Statement.—A full report of this case, when before this court on a former appeal, will be found in 12 Am & Eng. R. R. Cas. 90.

Upon its return to the District Court appellee filed a second amended original petition, in which he alleged, in substance, that appellant owned and operated a telegraph line from the town of Cameron, in Millam County, to the town of Cleburne, in Johnson County, transmitting telegrams for hire; that on September 30, 1882, appellee's wife, Bettie Levy, died, and his infant child died the day before, near said town of Cleburne; that appellee, being in straightened circumstances, among strangers and in need of pecuniary assistance about the funeral obsequies and burial of his said wife, and desirous of removing the corpse of his wife to Milam County for interment, and being in great distress and requiring and desirous of the help, consolation and assistance of his father, I. Levy, then residing in said town of Cameron, and also being desirous of the help, consolation and assistance of Mrs. Catharine A. Dean, the mother of his wife, who also resided at said town of Cameron, delivered to appellant about 10 o'clock A.M., of October 1, 1882, the following telegram, paying the charges thereon and informing appellant of the necessity for a prompt transmission and delivery of the same, and that appellant undertook to deliver the same in a reasonable time:

**"GULF, COLORADO AND SANTA FÉ RAILWAY TELEGRAPH.**

"All messages taken by this Company are subject to the following terms:

"To guard against mistakes or delays the sender of a message should order it repeated. For this, one half the regular rate will be charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes, or delays in the transmission or delivery, or for non-delivery of any unrepeatd message, whether happening by the negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message beyond fifty times the sum received for sending the same; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz.: 1 per cent for any distance not exceeding 1000 miles, and 2 per cent

for any greater distance. No employee of the company is authorized to vary the foregoing.

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the terminal office—for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

"Send the following message, subject to the above terms, which are hereby agreed to:

"CLEBURNE, October 1, 1882.

"To I. Levy, Cameron, Texas:

"Bettie and baby dead. Come to Cleburne to-night train to my help. Wade meet you. Tell mother. J. T. Levy.

["Read the notice and agreement at the top."]

That appellee prepaid to appellant 70 cents, the charges on said message; that notwithstanding appellant's undertaking to deliver said telegram in a reasonable time, appellant wilfully, and by its carelessness and gross negligence, failed to deliver the same within a reasonable time, and did not deliver the same until about 11 o'clock A. M. of October 2, 1882; that October 1, 1882, the day on which the telegram was delivered to appellant, was Sunday, but that the transmission and delivery of the same was a work of necessity and charity; that appellee kept the body of his wife disinterred, awaiting the arrival of said I. Levy, and expecting, also, the arrival of the mother of his wife, until about 10 o'clock A. M. on October 2, 1882, when his father, I. Levy, failing to arrive and failing to hear from him, and it being impossible to keep the body of his wife longer out of the grave, he had her buried; that if appellant had delivered said telegram to appellee's father, I. Levy, he would have come to his relief and would have rendered him all needful assistance, and that he and his said wife's mother would have been present at the funeral obsequies and burial of his wife, and would have comforted and consoled him on that sad occasion; that on account of the absence of appellee's father and his wife's mother he was compelled to put the body of said wife away among strangers and to bear his heavy affliction alone, without the comfort and consolation of any relative or friend; that appellee incurred, on account of awaiting the arrival of his said father, an actual expense of not less than \$25; that on the failure of his father to answer said telegram, or to come to his relief, he was greatly



distressed and mortified, and that the injury inflicted on the feelings of appellee was painful in the extreme, and that he was damaged in the sum of \$25 actual money paid out, in addition to which he asked actual compensatory damages in the sum of \$2000, and exemplary damages in the sum of \$2000. October 16, 1883, appellant filed its first amended original answer by which it pleaded:

1. A general denial.

2. That appellant had used due diligence to deliver the telegram, and that if there was any negligence it was the negligence of its messenger boy, who up to that time had been diligent, careful, and prompt in the discharge of his duties, and that as soon as his negligence became known to appellant he was discharged by it.

3. That the telegram was written upon a blank form, which constituted the contract between plaintiff and defendant, which is as above set out.

That plaintiff did not have his message repeated, as required by the terms of said contract, and that the damages were liquidated by the contract at 70 cents, the amount paid by plaintiff for sending the message, which is beneath the jurisdiction of the court, and prayed that the suit be dismissed; that plaintiff had failed to comply with the provision of the contract, which provided that the defendant should not be held liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

Plaintiff excepted generally and specially to defendant's answer. The court sustained the exceptions to so much of the answer as sets up in bar the failure of plaintiff to make his claim in writing in sixty days, on the ground that the petition in the case, which was filed, and service had on the local agent of the defendant in Milam County within the sixty days, was a compliance with that provision of the contract, and overruled the exceptions to the rest of the answer.

Before the ruling of the court on the exceptions defendant filed a supplemental answer, in which he denied that the agent in Cameron County, upon whom the service was made, was its agent for any purpose except that of attending to the shipment and receipt of freight and messages.

The trial of the case resulted in a verdict and judgment for appellee for \$500.

WATTS, J.—According to the view entertained of this case the decisive question is as to whether the verdict is sustained by the evidence. The actual monetary damage was about \$25, while the verdict and judgment is for \$500. As mental suffering and anguish constituted the only other element of damages submitted to the jury, it may be assumed that at least \$475 of the amount was awarded for mental anguish or suffering, for respecting that

issue the following instruction was given by the court, viz.: "But when the delay in delivering the message is attended with circumstances of wilful wrong, gross neglect, or opposition, then other damages to the injury of the feelings and mental suffering will be allowed."

In *Sorelle v. Western Union Telegraph Co.*, 56 Texas, 310, it was held that injury to the feelings, or mental anguish caused by the neglect of another, constituted actual damages for which a suit might be maintained and a recovery had. But as to the particular point that case is overruled by the decision in *G., C. & S. F. R. R. v. Levy*, 59 Texas, 569; and also, in effect, when this case was before the court on the former appeal (*G., C. & F. S. R. R. Co. v. Levy*, 59 Texas, 549), where it is said: "Upon the whole case, as made by the petition and evidence, we are of the opinion that the appellee was entitled to recover whatever damage the proof may justify over and above such sum as he paid for the transmission of the message, and this in the way of exemplary damages, if the negligence of the appellant in failing to deliver the message was wilful or gross, which is a matter to be determined by a jury, under proper instructions."

It must now be considered as settled that mental anguish, or injury to the feelings, is exemplary and not actual damages; and being exemplary, or punitive damages, can only be recovered when caused by gross neglect.

The term "gross negligence" is used both in our Constitution and our statute in such connection as to render the distinctive difference between the other degrees and gross negligence of practical importance in our system. Gross negligence has been variously defined by text writers and courts, and the following are given as examples of the two extremes. In *Louisville & Nashville R. R. Co. v. Robinson*, 4 Bush. Ky. 509, Judge Robertson, speaking for the court, said: "Gross neglect is either an intentional wrong, or such a reckless disregard of security and right as to imply bad faith, and, therefore, squints at fraud, and is tantamount to the magna culpa of the civil law, which, in some respects, is quasi criminal;" while in *Gill v. Middleton*, 105 Mass. 480, it was remarked that "the degrees of negligence so often spoken of in the text books do not admit of such precision and exactness of definition as to be of any practical advantage in the administration of justice, without a detail of the facts which they are intended to designate."

Evidently neither of these definitions, or rather statements, can be considered sound. In our own Constitution and statute the term gross negligence is used in connection with, and as closely assimilated to such terms as wilful act or omission. For illustration: the statute provides, "when the death is caused by the wilful act or omission, or gross negligence of the defendant,

exemplary as well as actual damages may be recovered." And the same connection is preserved in the Constitution. Under our system gross negligence is not tantamount to a wilful act or wilful omission; a wilful act is an affirmative act intentionally done, while wilful omission is intentional non-action; that is, a party upon whom a duty is imposed intentionally omits its performance. Gross negligence does not imply an intentional wrong, nor does it import any intention or design to produce a particular injury, but it signifies a thoughtless disregard of consequences. It imports the absence of volition respecting results, and not its existence.

Judge Story says truly, that "gross negligence is the want of slight care and diligence." From this it results that if care and diligence be exercised, even though it should be an inconsiderable or unimportant degree, then gross negligence cannot exist.

In *T. & P. R. R. Co. v. Burns*, 4 Texas Law Review, 58, it was remarked that "gross negligence is distinguishable from all other degrees of negligence by the entire absence of care and diligence." That seems to be correct, for if any care or diligence is used, however unimportant, it amounts to slight care, in the absence of which only can gross negligence exist.

By confining the operation of gross negligence in the administration of justice to the limits prescribed by this definition, then we will have a rule applicable alike in all cases. But to adopt the idea that no rule of certainty can be applied, and conclude that each case must be determined by its own peculiar circumstances, would result in the abandonment of all rule; then, figuratively speaking, the administration of justice would depend upon the length of the chancellor's foot.

Then to determine the question as to whether the verdict is sustained by the evidence, it remains for us to apply the law to the facts as disclosed by the record. It appears that appellee prepared the message at Cleburne on Sunday morning about 10 o'clock, and paid the charge for its transmission, and that the Cleburne operator promptly and correctly transmitted it over the wire to Cameron, where the message was reduced to writing by the acting operator, who placed it in an envelope addressed to Isaac Levy, and handed it to the messenger with directions to deliver it to Mr. Levy. It appears that the messenger, for the purpose of making the delivery, went immediately to the storehouse of Levy upon the square, and finding it closed he returned to the office. Again, about two o'clock P.M., he went to the storehouse, and finding it closed he returned to the office, and about four o'clock that evening he went, for the third time, to the store and found it closed, so that the message was not delivered until the next day.

This messenger was a boy about ten years old and had been in the employment of the company for some time, and had heretofore discharged the duty of messenger with reasonable promptness; no

complaints were made against him. It is shown that Isaac Levy's residence and storehouse are about the same distance, but in different directions from the office. The messenger testified, in substance, that he had previously known where Mr. Levy's residence was, but from what he says it seems to have escaped his recollection while he was attempting to deliver the message; that he carried the message to the store three times that day for the purpose of delivering it, but each time found the store closed; that he made no inquiry for Mr. Levy of any one.

From this summary of the evidence it will be seen that the operator at Cleburne promptly and efficiently discharged his duty, so that no charge of negligence is imputable to him. It appears that the acting operator at Cameron promptly received the message, correctly reduced it to writing, placed the same in an envelope addressed to Levy, and handed it to the messenger, directing him to deliver it to Levy. The only semblance of negligence upon the part of this operator was his failure to inform the boy of the importance of the message, and the necessity of its prompt delivery, but it appears that the standing instruction to the messenger was to promptly deliver all messages placed in his hands, hence, no negligence is imputable upon that ground.

As the boy had been in the employment of the company for some time, and had theretofore performed his duty to the satisfaction of all concerned, it cannot be said that the company was grossly negligent in retaining the messenger in its employment under the circumstances. He was promptly discharged for his supposed negligence in failing to deliver the message to Levy.

It is shown that the messenger made the different efforts during the day to deliver the message by going to Levy's store, and finding it closed each time. But, it is claimed that a faithful discharge of the duty would have required him, under the circumstances, to have gone to Levy's residence, and in that assertion we concur, but his failure to do so under the circumstances did not constitute gross negligence. Suppose that the boy had gone to the residence and found that closed, then no negligence would have been imputable to the messenger, for that would have amounted to the exercise of reasonable diligence and care, and that is all which could have been required. Admitting that the boy showed but little discretion in going to the storehouse, instead of the residence, nevertheless the fact that he made the effort and used slight care, at least, in attempting to deliver the message, is indubitable. Consider the course adopted by the messenger in attempting to deliver the message inapt, still seemingly it was an honest effort on his part to discharge the duty, and most assuredly his conduct upon that occasion cannot be characterized as grossly negligent. While negligence may be imputed to the company with respect to the message, yet it was

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not gross negligence for which exemplary damages might be recoverable.

In view of another trial it should be remarked that the institution of the suit was a full compliance with the stipulation in the conditions, that the claim should be presented in writing within sixty days, even though the contract might be considered as established.

The real object of such requirement and the ground upon which it is sustained as reasonable, is that the company will thereby be enabled to preserve the evidence surrounding the transaction. As the other errors complained of are not likely to rise upon another trial it is not necessary to consider them.

Our conclusion is that the judgment ought to be reversed and the cause remanded.

Reversed and remanded.

**Damages for Non-delivery of Telegraph Message.**—The authorities upon this subject will all be found collected in the note to the previous report of this case. 12 Am. & Eng. R. R. Cas. 90. See also Western Union Telegraph Co. v. Reynolds Bros., 77 Va. 173; s. c., 5 Am. & Eng. Corp. Cas. 182; Doughtry v. American Union Telegraph Co., 5 Am. & Eng. Corp. Cas. 203; Russell v. Western Union Telegraph Co., 5 Am. & Eng. Corp. Cas. 218; Western Union Telegraph Co. v. Baltimore & Ohio R. Co., 5 Am. & Eng. Corp. Cas. 223; Lassiter v. Western Union Telegraph Co., 89 N.C. 334; s. c., 5 Am. & Eng. Corp. Cas. 230

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**SAN ANTONIO STREET R. R. Co.**

**v.**

**HELM AND WIFE.**

*(Advance Case, Texas. 1885.)*

When the statement of the cause of action and of the defence made by the court in its charge is correct as far as it goes, it is the duty of a party desiring further instructions to ask for them, otherwise he cannot complain that they are not given.

The same rule applies when an instruction contains a correct exposition of law applicable to question of liability, but that part of it as to the measure of damages is considered not sufficiently specific.

When, in a suit for damages to the wife, husband and wife are joined, and no objection is made to the joinder, and judgment is given for plaintiffs, the judgment is as a complete bar to any subsequent suit by husband and wife, as in a case where the husband alone was plaintiff.

— **APPEAL from Bexar County.**

**STAYTON, J.**—When the statement of the cause of action and the nature of the defence made by the court in its charge was cor-

rect as far as it went, but was not full, it was the duty of the complaining party, if he deemed it necessary, to request a fuller charge, otherwise he will not be heard to complain. The same rule applies when an instruction contains a correct exposition of the law applicable to the question of liability, but that part of it as to the measure of damages is considered not sufficiently specific.

In actions to recover money which will be community property when realized, the wife is not ordinarily a necessary or proper party; but in this case no objection was taken to her joining with her husband as a plaintiff, and it cannot be raised here for the first time. No injury results to the appellant from the rendition of a judgment in favor of the husband and wife. In *Texas Central R. R. Co. v. Burnett et ux.*, 2 Texas Law Review, 386, in an action similar to the present, it was held that the joinder of the husband and wife as plaintiffs was error, was improper, and for the action of the court below in overruling an exception based on such misjoinder, a judgment subsequently rendered in the case should be reversed. It is not for every erroneous ruling that a judgment should be reversed, but this should be done only in those cases in which the opposite party has probably been injured thereby. In suits of the character of the present (for personal injuries to wife) we are of the opinion that a judgment in favor of a husband and wife does not ordinarily operate to the prejudice of the defendant against whom it is rendered. Such a judgment is as complete a bar against any claim which might subsequently be set up by the husband and wife as would be a judgment rendered in a case in which the husband was sole plaintiff. If the costs be increased by the joinder of the wife when she ought not to be joined, or if a defendant be shown in any other manner to have been prejudiced, then the overruling of an exception based on the misjoinder of parties would be sufficient ground for reversal; but if no such injuries be shown, then the action of the court below in overruling such an exception is not sufficient ground for reversal in cases of this character. There is no error in the judgment, and it is affirmed.

Affirmed.

**Husband and Wife.**—For a full discussion of the subject of suits to recover damages for injuries to married women, and the proper parties to such suits, and the effect of judgments thereon, see *Northern Central Ry. Co. v. Mills*, and note, *infra*.



## NORTHERN CENTRAL Ry. Co.

v.

MILLS.

(61 *Maryland Reports*, 855.)

Action was brought on the 8th of April, 1882, by A. W. M. and M. his wife, against a railroad company, to recover damages for personal injuries sustained by the wife. The declaration contained but one count, in which, after detailing the injuries sustained by the wife, it was alleged, "and also thereby the said plaintiffs were forced and obliged to, and did pay, lay out and expend a large sum of money in and about endeavoring to cure the said M. of the bruises," etc., "occasioned as aforesaid." After verdict for the plaintiffs, a motion in arrest of judgment was made on the ground that the declaration included a cause of action for which the husband should sue alone. The motion was overruled. On appeal it was *held*.

1st. That it was error to include in the claim of damages money expended to effect the wife's cure, the right of action for money thus expended being in the husband alone.

2d. That if the two causes of action were contained in two separate counts of the declaration, the error could be availed of on a motion in arrest of judgment; but where the declaration contained but one count, the motion would not be allowed.

3rd. That the action of the court below in overruling the motion in arrest of judgment, was affirmed upon the distinct ground that after verdict it must be intended that at the trial the evidence was confined to the personal injury and suffering of the wife, and that none was offered as to the expenditure of money in curing her, or if offered, that it was rejected by the Court and excluded from the consideration of the jury.

4th. That in determining as to the motion in arrest, the Court was confined strictly to the record proper of the case itself, and could take no notice of the docket entries or instructions to the jury contained in the diminution record.

## APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court. The record first sent to the Court of Appeals contained only the pleadings, and the verdict, the motion in arrest, and the action of the Court thereon; the entry of judgment, and the order for an appeal; and an entry showing that the appellant had filed an appeal bond which was approved, and an affidavit that the appeal was not taken for delay. The appellant procured a writ of diminution under which there were sent up from the Court below short copies of the docket entries in this case, and in a case brought by the husband alone against the same defendant, and an instruction given in each case.

Bernard Carter for the appellant.

John T. McGlone and Richard M. Venable for the appellees.

**MILLER, J.**—This appeal brings up for review the action of the Superior Court in overruling a motion in arrest of judgment. The ground of the motion is, that in the action by husband and wife for personal injuries suffered by the latter, and for which both must join in the suit, the declaration includes also a cause of action for which the husband should sue alone. In determining such a question this Court is, of course, confined strictly to the record proper of the case itself, and we can therefore take no notice of any of the extrinsic matters contained in the diminution record. *Gover v. Turner*, 28 Md. 606.

The suit was brought on the 8th of April, 1882, by Alfred W. Mills and Margaret E. Mills his wife. The declaration, which contains but a single count, avers, in substance, that the defendant, by its agents and servants, so negligently and carelessly moved a train of cars drawn by horses along its tracks at the corner of Monument and North streets in the city of Baltimore, where the plaintiff Margaret with her husband was, at the time, crossing, that she, the said Margaret, in order to escape from being run over, was forced to leap from the track, and thereby sustained a fracture of the ankle, and was greatly hurt, bruised, and wounded, and became sick, sore, lame, and disordered, and so continued for a long space of time during which she, thereby, suffered and underwent great pain, and was hindered and prevented from performing and transacting her necessary affairs and business, "and also, thereby, the said plaintiffs were forced and obliged to, and did pay, lay out and expend a large sum of money in and about endeavoring to cure the said Margaret of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid, occasioned as aforesaid;" and the plaintiffs claim \$10,000. The defendant pleaded that it did not commit the wrong alleged. The case was tried upon issue joined on that plea, and the jury rendered a verdict in favor of the plaintiff for \$2000 damages.

When this suit was instituted there was no statute regulating such actions, and according to the common law husband and wife must join if the action be brought for personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not to that of the husband alone, for the damages will survive to the wife if the husband die before they are recovered. But in every such case care must be taken not to include in the declaration by the husband and wife any statement of a cause of action for which the husband alone ought to sue; therefore, after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance or expenses sustained in curing her. 1 Chitty's Pl. 83; *Baltimore City Passenger Ry. Co. v. Kemp and Wife*, 61 Md. 74. In our opinion the declaration in the present case offends this rule of good pleading. After stating the injury to the wife and her sufferings therefrom, it goes on

to allege that the plaintiffs were thereby obliged to, and did expend a large sum of money in effecting or endeavoring to effect her cure, and the claim for damages is general. For money thus expended the right of action is in the husband alone. There is no averment that it was paid by the wife out of, or that its payment had been charged upon, her separate estate, or that she had united with her husband in any written obligation or contract to pay it. The most that can be inferred from the allegation that the money was paid by the "plaintiffs" is that it was paid by both, that is, part by the wife and part by the husband, and there can be no question but that for so much as was paid by him, he, alone, ought to sue. It was therefore a mistake on the part of the pleader to include in this declaration a cause of action for which the husband alone ought to have sued.

What then is the consequence of this mistake, and how can it be availed of by the defendant? In 1 Chitty's Pl. 85, the law is thus stated: "If the wife be improperly joined in the action, and the objection appear from the declaration, the defendant may, in general, demur, move in arrest of judgment, or support a writ of error: though we have seen that after verdict the mistake may sometimes be aided by intendment." Direct authorities upon the subject are comparatively few, and this, no doubt, arises from the fact that such mistakes have very rarely been made. It appears to be well settled, however, that if in an action *ex delicto* by husband and wife, the declaration sets out in one count a cause of action for which both must join, and in another a cause of action for which the husband alone can sue, and there is a general verdict, a motion in arrest must prevail. This seems to be the result of the decisions in *Barnes and Wife v. Hurd*, 11 Mass. 59, and in the analogous cases of *Corner v. Shew*, 3 Mees. & Wels. 350, and *Kitchenman v. Skeel*, 3 Excheq. 48. So also where the declaration in one or several counts states causes of action for all of which the husband alone can sue. *Saville and Wife v. Sweeny*, 4 Barn. & Adol. 514. But where in like cases courts have had to deal with a single count in which a similar mistake has been made, the decisions have been different, and we have found no such case in which an arrest of judgment has been allowed.

In the case of *Russell and Wife v. Corne*, as reported in 2 Ld. Ray. 1031, it appears the action was by baron and feme for the battery of the latter. Several counts in the declaration were for the battery of the wife simply, but there was one count for beating her *per quod negotia ipsius* (the husband) *infecta remanserunt*, with conclusion *ad damnum ipsorum*. Upon not guilty pleaded there was a verdict for the plaintiffs with entire damages, and there was a motion in arrest upon the ground that husband and wife could not join as this count was laid; for the wife cannot join for damages accruing to the husband by the loss and delay of business

in which she has no interest. But the motion was overruled, and among the judgments delivered by the several Judges, Powell, Justice, is reported to have said, "I will not intend that the Judge allowed any evidence to be given as to the special damage to the husband; but only admitted proof as to the battery." And in the note to the report of the same case in 1 Salk. 119, the opinion is attributed to Chief Justice Holt, that "he would not intend the Judge suffered the husband's business being undone to be given in evidence." That such evidence under a similar state of pleadings ought to be rejected, was expressly decided in *Dengate and Wife v. Gardiner*, 4 Mees. & Wels. 5. That was a joint action by husband and wife for slanderous words spoken of the wife, and the declaration stated as special damage that by reason of the speaking of the words certain persons refused to employ her as a servant. The plea was not guilty, and at the trial before Lord Abinger the plaintiffs tendered evidence of such special damage, but the learned judge rejected it as inadmissible in such joint action, and held that the profits of the wife's wages belong entirely to the husband, and he alone can sue for the loss of them. On motion for a new trial because of the rejection of this evidence, this ruling was sustained and the motion was refused. *Todd and Wife v. Redford*, 11 Mod. 264, was an action of assault and battery by husband and wife, and the declaration set forth that the defendant assaulted and bruised the wife by driving a coach over her, *ratione inde* the husband laid out divers sums of money in her cure. After verdict a motion in arrest was made on the ground that they should not have joined, because the damage was laid to be for money expended in the cure of the wife as well as for the battery, and entire damages being given, the verdict is bad for the whole. The Court overruled the motion, but seems to have placed its decision upon the ground that the gist of the action was "only the beating of the wife, and the *ratione inde* is only an aggravation of damages," by which we understand the Court to have held that what followed the words "*ratione inde*" was merely a description of the trespass by way of aggravation. Other cases are also referred to in the note to *Russell and Wife v. Corne* (1 Salk. 119), to the effect that where there is a proper cause of action in the wife, though circumstances are added which are only actionable by the husband, the declaration by husband and wife is good, and the additional circumstances are only regarded as matter of aggravation. In *Lewis and Wife v. Babcock*, 18 Johns. 443, the declaration is almost literally the same as that in the present case, and the motion in arrest was founded upon precisely the same grounds. The Court admitted that upon demurrer the objection would have prevailed, but held it not good on motion in arrest, and gave the plaintiffs judgment on the verdict. In *Fuller and Wife v. Naugatuck R. R. Co.*, 21 Conn. 557, each count in the

declaration, after stating injuries to the person of the wife and her sufferings therefrom, contained the further allegation, as in this case, that "thereby they, the plaintiffs, were forced and obliged to, and did necessarily pay, lay out and expend a large sum of money, viz., the sum of \$200 in and about, endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness, and disorder aforesaid occasioned as aforesaid." The general issue was pleaded and, after a verdict for general damages, the defendant moved in arrest because the several counts of the declaration each join a claim for damages on account of the wife's personal injury, with a claim for the expenses of her cure, but the court overruled the motion for the reason, among others, that as there was a ground of damages for which husband and wife could recover, it will be presumed after verdict, that the court allowed no proof to be given of any ground on which they could not recover, though stated in the declaration. The same intendment was recognized and approved, on writ of error, in *Taylor and Wife v. Knapp*, 25 Conn. 510, where the suit was for an injury to a right belonging and appurtenant to the wife's land, and the Court said: "But if the declaration is susceptible of a broader construction, as setting up an injury to her right, and to his as a distinct co-tenant of a part, we think, after verdict it must be held that the Judge allowed no inquiry except as to damages sustained by the husband and wife to her rights or easements as distinct from his." Reference may also be made to the case of *Harrison and Wife v. Newkirk*, 20 N. J. (Law Rep.) 176, where the same intendment after verdict appears to have met the approval of the Supreme Court of New Jersey.

The distinction, as to effect, between stating causes of action for which different parties ought to sue, in separate counts of the declaration, and joining them in the same or a single count, may seem narrow and refined, but nevertheless, as shown by some of the adjudications referred to, it is supported by very high authority. In fact the Court of King's Bench went so far in *Lawrie v. Dye-ball*, 8 Barn. & Cress. 70, as to say: "It is a settled rule that if the same count contains two demands, or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts."

We have been thus led to a review of these adjudications not only for the reason that the case appears to be of importance to the parties, at least to those who are seeking to sustain the verdict and judgment, but also because the decisions seem, in some instances, to have been placed on different grounds, and especially because we have found, upon examination, that the weight of authority is opposed to what were our first impressions as to the law upon this subject. We affirm the action of the Court below in overruling the motion in arrest, and do so upon the distinct ground



that after verdict it must be intended that at the trial the evidence was confined to the personal injury and suffering of the wife, and that none was offered as to the expenditure of money in curing her, or if offered that it was rejected by the Court and excluded from the consideration of the jury. And this we regard simply as a reasonable and proper extension of the well-settled general principle, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict. This salutary rule had its origin in the early statutes of amendment and. jeofails, which were enacted to prevent a failure of justice by mere slips in pleading, and has not only been repeatedly approved by this Court, but has been substantially and almost literally incorporated by statute into our simplified system of pleading and practice. Code, Art. 75, sec. 9; *Merrick v. Bank of Metropolis*, 8 Gill, 59; *Gent v. Cole*, 38 Md. 110. There is nothing in the case of *Stirling et al. v. Garritee*, 18 Med. 468, when carefully considered, in conflict with what we now decide. The difficulty in that case was not simply that causes of action for which different parties ought to have sued, were joined in the same count. The defect was more serious and fundamental. It was hardly possible to ascertain from the declaration what the character of the action was. The court said if it had any distinctive character it must be in the nature either of trover or detinue; if the former, the judgment could not be supported because no damages were laid in the declaration for the conversion of the property; if the latter, then the judgment on a verdict which did not ascertain the value of the property would be erroneous. It was manifest that a judgment upon the verdict in that case would not have had such reasonable certainty as would have enabled the defendant to plead it in bar of a subsequent suit for the same cause of action, and the judgment was therefore arrested. In our apprehension the difference between them is quite sufficient to prevent that case from controlling the decision of this.

Judgment affirmed.

**Joint Actions by Husband and Wife for Personal Injury to Wife.**—When a married woman sustains injuries and a suit is brought to recover damages in which both husband and wife join, the husband is a nominal party merely. In such case the only damages recoverable are the actual damages done the wife. The husband is entitled to nothing for the expense caused him and the loss of his wife's society and services. *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557; *Barnes v. Hurd*, 11 Mass. 59; *Heirn v. McCaughan*, 32 Miss. 17; *Barnes v. Martin*, 15 Wisc. 240; *Lewis v. Babcock*, 18 Johns. 448; *Brooks v.*



Schwerin, 54 N. Y. 343; Smith v. St. Joseph, 55 Mo. 456; East Tenn., Va. & Ga. R. Co. v. Cox, 57 Ga. 252; Baltimore City Pass. R. Co., v. Kemp et. ux., 61 Md. 74; s. c., 18 Am. & Eng. R. R. Cas. 220. In Iowa, however, the husband may in such case recover for the loss of his wife's services. McDonald v. Chicago & N. W. R. Co., 26 Iowa, 124.

**Actions by Married Woman Alone for Personal Injury to Her.**—In some States the common law is changed by statute and in case of an injury to a married woman she must sue alone for the injuries sustained by her. Berger v. Jacobs, 21 Mich. 215; Michigan, etc., R. Co. v. Coleman, 28 Mich. 440; Musselman v. Gallagher, 32 Iowa, 383; Tuttle v. Chicago, etc., R. Co., 42 Iowa, 518; Chicago, etc., R. Co. v. Dunn, 52 Ill. 260; Seymour v. Chicago, B. & Q. R. Co., 3 Biss. 43; Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260; Chicago, B. & Q. R. Co. v. Dickson, 67 Ill. 122; Chicago & N. W. R. Co. v. Button, 68 Ill. 409.

**Wife cannot Recover for Expenses Incurred about her Cure.**—In a suit in which the wife is the real plaintiff, she cannot recover for expenses incurred about her cure. Her husband alone can recover these. Klein v. Jewett, 26 N. J. Eq. 474; Tuttle v. Chicago, Rock I. & P. R. Co., 42 Iowa, 518; Northern Central R. Co. v. Mills et ux., 61 Md. 355; s. c., supra.

**Husband may Sue alone for Personal Injury to Wife.**—The husband may institute suit alone to recover the damages caused him by the injury to his wife. McKinney v. Western Stage Co., 4 Iowa, 420; Whitcomb v. Barre, 38 Vt. 148; Kavanaugh v. Janesville, 24 Wisc. 618; Rogers v. Smith, 17 Ind. 323; Long v. Morrison, 14 Indiana, 595; Laughlin v. Eaton, 54 Me. 156.

**Husband may in same Action Recover for Personal Injuries to Himself and Wife.**—When both husband and wife have been injured by the same accident, the husband may in the same action recover for the injury done to himself and for that which he has sustained by the injury to his wife. Cincinnati, etc., R. Co. v. Chester, 57 Ind. 297; Hopkins v. Atlantic, etc., R. Co., 36 N. H. 9.

An action brought by the husband on account of injuries to his wife is no bar to a subsequent action by him for his own injuries occurring at the same time. Newbury v. Connecticut, etc., R. Co., 25 Vt. 377.

**Damages Recoverable by Husband for Personal Injury to Wife.**—A husband may in a suit instituted by him to recover damages for injuries inflicted upon his wife recover for the loss of the services and society of his wife and also the costs incurred by him for medical attendance, nursing and the like. Mowrey v. Chaney, 43 Iowa, 609; Smith v. St. Joseph, 55 Mo. 456; Matteson v. New York, etc., R. Co., 35 N. Y. 487; Tuttle v. Chicago, etc., R. Co., 42 Iowa, 518; Neier v. Missouri Pac. R. Co., 12 Mo. App. 35.

But when the wife has once been authorized by the husband to bring suit for any outlays incurred by him for her cure and recovery, he is estopped to institute another suit to recover such outlays. Neumeister v. Dubuque, 47 Iowa, 465. And in some cases it is held that recovery by husband and wife in a joint action for injury to the wife precludes any subsequent suit by the husband. San. Antonio St. R. Co. v. Helm. et. ux., supra.

**Survival of Cause of Action.**—The right of action on the part of the husband for expenses incurred in consequence of an injury to his wife survives him and passes to his personal representatives; but the right of action for the deprivation of his wife's society dies with him. Cregin v. Brooklyn Crosstown R. Co., 83 N. Y. 595.

**Presumption as to Measure of Damages.**—When in an action by the husband to recover damages for injuries done the wife the complaint is ambiguous as to the exact damages sought to be recovered, it will be presumed after verdict that proper instructions were given by the court on this head and that the jury acted accordingly. Rogers v. Smith, 17 Ind. 323; Fuller v. Naugatuck R. Co., 21 Conn. 556; Lewis v. Babcock, 18 Johns. 443.

But see, contra, Barnes v. Hurd, 11 Mass. 59.

NEW YORK, LAKE ERIE AND WESTERN R. R. Co.

v.

STROHM.

(96 *New York Reports*, 805.)

In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, the evidence of experts as to future consequences which are expected to follow the injury is competent.

To authorize such evidence, however, the apprehended consequences must be such as in the ordinary course of nature are reasonably certain to ensue; consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating the damages and may not be proved.

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made September 11, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

The evidence, so far as material to the question discussed, is stated in the opinion.

B. F. Tracy for appellant.

Samuel Hand for respondent.

RAPALLO, J.—We feel constrained to order a new trial in this case on account of the admission of the evidence of Dr. Spitzka as to the disorders into which the symptoms the plaintiff was said to have exhibited, might develop. Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative, or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring, as amounts to a reasonable certainty that they will result from the original injury. *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 541; *Filer v. N. Y. C. R. R. Co.*, 49 Id. 45; *Clark v. Brown*, 18 Wend. 229; *Lincoln v. Saratoga & S. R. Co.*, 23 Id. 425, 435.

The witness, Dr. Spitzka, had personally examined the physical

condition of the plaintiff, had received from him an oral statement of his symptoms, and had also been asked a hypothetical question, embodying a description of the apparent condition and symptoms exhibited by the plaintiff since the injury, as claimed by the plaintiff's counsel to have been established by the evidence. He was then asked what the symptoms related to him and those described in the hypothetical question indicated, and he answered that the elements of the hypothetical question proved epilepsy, while those related by the patient himself left that matter open, leaving it either as a preliminary stage of epilepsy or meningitis, or traumatic dementia, the witness could not decide which of the three. Being afterward asked as to the permanency of the condition of the plaintiff, he stated that it was very likely to be permanent. The question was then put to him by the plaintiff's counsel, "What do you mean by very likely?" and he answered, "I mean that the boy will always have some remnants of this injury, some reminder of it, great or small, that is certain; how much he will retain I cannot tell, but I think it very likely he will retain."

Here the witness was interrupted by an objection of the defendant's counsel to the words "very likely," and what followed, a sentence too speculative. The court overruled the objection, and an exception was taken. The witness then answered that the plaintiff was likely to retain the greater part of the symptoms if he did not develop worse signs. The following question was then put: Q. "You said it might develop into worse signs or conditions. What do you refer to?"

This question was objected to as speculative and hypothetical. The objection was overruled, and the counsel for the defendant excepted, and the witness then answered: "A patient sustaining such injuries and presenting such premonitory signs, may develop traumatic insanity, or meningitis, or progressive dementia, or epilepsy with its results."

This answer was quite responsive to the question asked, which in substance called upon the witness to state what worse signs or conditions might be developed from the injuries sustained by the plaintiff; and the evidence being admitted by the court in the face of the objection that the inquiry was too speculative, the door was opened for the jury in estimating the damages, to include compensation for the mere hazard to which the plaintiff was claimed to be exposed of being afflicted with the terrible disorders of some of them, enumerated in the answer. It is impossible to reconcile the admission of this evidence with the authorities before referred to, or to say that the error could not have prejudiced the defendant, or influenced the amount of the verdict.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur; except Ruger, Ch. J., and Danforth, J., who dis-

sent upon the ground that the question is not properly raised, and if it is that evidence by experts of the probable and even possible consequences of the injury is admissible for the consideration of the jury.

Judgment reversed.

**Damages for Permanent Injuries.**—A party injured by a railroad company is entitled to recover damages not only for the injuries actually inflicted but for such as the evidence shows are reasonably certain to ensue in the future. *Spicer v. Chicago & N. W. R. Co.*, 28 Wisc. 580; *Totten v. Pennsylvania R. Co.*, 11 Fed. R.p. 564; *Fry v. Dubuque & S.W. R. Co.*, 45 Iowa, 416; *Collins v. Council Bluffs*, 82 Iowa, 824; *Houston & T. C. R. Co. v. Boehm*, 9 Am. & Eng. R. R. Cas. 866; *Funston v. Chicago, R. I. & P.R. Co.*, 14 Am. & Eng. R. R. Cas. 640; *Atchison, T. & S. F. R. Co. v. Moore*, 15 Am. & Eng. R. R. Cas. 812.

**Expert Evidence as to Future Effects of Personal Injuries.**—The evidence of experts is ordinarily admissible as to the probable future effects of a personal injury. *Filer v. New York Central R. Co.*, 49 N. Y. 42; *Wilt v. Wickera*, 8 Watts (Pa.), 227; *Matteson v. New York Central R. Co.*, 85 N.Y. 487.

But see *Kline v. Kansas City, St. J. & C. B. R. Co.*, 50 Iowa, 656.

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JOHNSON

v.

CENTRAL VERMONT R. R. Co.

(56 Vermont Reports, 707.)

In an action to recover for injuries claimed to have been caused by the negligence of the defendant's servant, a physician, who had examined the plaintiff on three different occasions, was asked, "From what you have known of his case heretofore, and what you have learned of his condition here to-day, what do you say about his being able to do heavy work and hard work?" and answered, "I don't think it would be prudent for him to do hard work;" and again, to the question, "What is your opinion about his arm having been broken?" answered, "My opinion is that it was broken." *Held*, admissible.

It is not sufficient for the master to give proper instructions to his servant to avoid liability; but he must also see that they are obeyed.

It is presumed that a witness followed the directions given by the court.

**CASE** for the negligence of the defendant's servants. Trial by jury, March Term, 1883, Rowell, J., presiding. Verdict for the plaintiff. The court charged:

"It is immaterial to the master's liability that the servant at the time was neglecting to follow some rule of action that the master had given him, and the injury that actually resulted is attributable to the servant's failure to observe the direction given him. In

other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed."

H. F. Wolcott, J. G. Eddy, and L. M. Reed for the plaintiff.

E. L. Waterman for the defendant.

ROYCE, Ch. J.—The injury that the plaintiff claimed to recover for in this action, was occasioned, as he claimed, in consequence of the negligence and want of care of the defendant's servants. The plaintiff called Dr. Ray as a witness. Dr. Ray visited him once the next day after the injury, and again about two weeks after that, and examined him at the trial and before testifying. No question was made but what he was qualified to testify as an expert. He was asked, "From what you have known of his case heretofore, and what you have learned of his condition here to-day, what do you say about his being able to do heavy work?" He was permitted to answer the questions, subject to the defendant's exceptions. It is claimed the question was legally objectionable, because it called for an opinion based upon what he might have heard of his condition, and hence could not have been found wholly upon his own knowledge. The obvious and natural construction that would be put upon the language of the question would be, that he was required to give an opinion based upon what he had learned of his condition at the examinations that he had testified he made. And we have no doubt the doctor so understood it.

The physical ability of a party, claiming to have been injured, to labor, is a matter that experts are allowed to express an opinion upon. The capacity to labor is one of the tests that the law allows as tending to show the nature and extent of the injury.

The doctor was asked what his opinion was as to the plaintiff's arm having been broken. It is claimed that the question should have been so qualified as to have, in terms, called for an opinion based upon the examinations made by him. Before the question was answered, the doctor had been informed by the court that he could state what he saw and heard, and upon that he could give his professional opinion. The presumption is, that he followed the directions given by the court, and it was not error to permit the question to be answered.

The only exception taken to the charge, that is now insisted upon, is, that there was no evidence justifying what was said by the court upon the subject of master and servant. Very little of the evidence is detailed in the exceptions, but from the nature of the case and what it is said the evidence tended to show, it would appear that the court was called upon to instruct the jury, how far and under what circumstances a master could be made liable for the acts of his servants.

We perceive no error in the instructions given, and the judgment is affirmed.

SMITH

v.

METROPOLITAN R. R. Co.

(187 *Massachusetts Reports*, 61.)

In an action for personal injuries, an extract from a paper signed by the plaintiff's attending physician, containing a statement tending to contradict his subsequent testimony at the trial, may be read to the jury, the paper itself having been excluded; and the fact that the paper is also signed by a physician in the employ of the defendant is immaterial.

TORT for personal injuries occasioned to defendant on March 3, 1882, by a car of the defendant corporation being driven against the plaintiff's wagon, from behind, whereby the plaintiff was thrown from his wagon and injured. The defendant denied negligence on its part, and alleged a want of care on the part of the plaintiff.

At the trial in the Superior Court, before Knowlton, J., in May, 1883, the plaintiff testified as to the manner in which the injury was received, and as to the nature and extent thereof.

Dr. Towle, called for the plaintiff, testified that he attended the plaintiff on the day of the injury, and had attended him ever since. After stating the nature of his injuries at the time, he testified as follows: "About two months after his injury, I made an examination of him with Dr. Nichols, of the railroad company. The external injuries had recovered and the bruises had healed, so far as could be seen; there were no marks of disease externally, except a little redness of skin where the skin had been broken by the injury. He was still very lame, unable to straighten up, and complained of a good deal of pain in the hip, back, and knee. He was on a crutch. I don't think that at that time there was any tenderness of the back discoverable,—that was very apparent, at any rate. After the examination with Dr. Nichols, I saw the plaintiff occasionally, continuing the treatment of liniments and counter irritants for his back, he complaining still of the pain in this portion of his back, following down the hip and into the knee. As he began to move around more about his business, the leg grew worse, and has certainly since the first of the year been constantly growing worse. He is not as well now as he was three or six months ago, and has not been as well since he attempted to do more work and since he has exercised the leg more. Considering him as I knew him before he was hurt, taking the history of his case since he was hurt, and considering his present condition, I do not think he will ever recover. He is not able to do ordinary work, and I see no reason to suppose that he ever will be."

On cross-examination, Dr. Towle testified: "I do not think



there was any concussion of the spine, but the plaintiff cannot recover from his injuries, because there was injury to the nerve or to the fibrous membrane of the nerve which comes out from the spinal cord, distinct from the spinal cord, in the region of the second or third lumbar vertebra, and passes down the limb; that nerve is injured outside of the bony encasement. Possibly the injury may extend between the bones slightly, but not to affect the spinal cord. The injury to that nerve would not have been apparent to a skilful eye in two months after the accident. I cannot tell when I first discovered the tenderness; it has been very apparent all through. It was since the examination with Dr. Nichols that I discovered it; I noticed it in January last, and before that. At the examination with Dr. Nichols there was nothing shown that would go to show that there was any long impairment of health. The disease the plaintiff is laboring under is a disease of this nerve. The indications of this disease are the tenderness over the region where the nerve comes out, and the less muscular tension of the limb."

On re-direct examination, Dr. Towle testified that the muscular lameness of the back, mentioned in a paper signed by him, hereinafter referred to, was in the same region as the tenderness now testified to; that the plaintiff never complained of rheumatic pains, and he would have known of it if he had, and that what rendered the use of a crutch necessary was the injury to the back.

The paper above mentioned, which was signed by Dr. Towle and Dr. Nichols, purported to be a statement of the manner in which the injury occurred, and the condition of the plaintiff at the date of the paper. The paper itself was excluded from the jury; but the judge, against the objection of the plaintiff, permitted the defendant's counsel to read the following portion to the jury: "The fall thus occasioned caused various superficial bruises on the head, left shoulder, side, and leg, and a severe sprain of the muscles of the back; in consequence of which he was confined to bed for eight days, and was prevented from visiting his place of business for a period of three weeks. Now, at the end of two months from the date of the accident, there still remains some weakness of the left knee-joint, and a muscular lameness of the back, with occasional rheumatic pains in the latter region, rendering necessary the use of crutch and cane. Walking or other exercise still induces physical fatigue; but his bodily functions are in other respects all well performed. While we are both convinced of the reality of all the symptoms complained of and the absence of exaggeration on his part, we are on the other hand agreed that there exist no signs pointing to any long-continued impairment of health as the after-effect of this injury."

The evidence objected to was offered and admitted solely as affecting the testimony of Dr. Towle.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

S. B. Allen and J. K. Berry for the plaintiff.

W. Gaston and E. O. Shepard for the defendant.

BY THE COURT.—The extract from the paper signed by Dr. Towle was properly admitted, as a statement made by him at a former time tending to contradict his testimony on the stand. The fact that the paper was also signed by Dr. Nichols was immaterial. The court did not rule that the paper was admissible, or that it was competent to prove that Dr. Nichols had signed it. The ruling was, that it was competent for the defendant to read to the jury such parts of the written statement as contradicted the testimony of Dr. Towle. To this ruling the plaintiff has no ground of exception.

Exceptions overruled.

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SCHEFFLER, Adm'r, etc.,

v.

MINNEAPOLIS AND ST. L. RY. CO.

(*Advance Case, Minnesota. December 8, 1884.*)

In an action for the next of kin, under section 2, c. 77, Gen. Stat. of Minnesota, 1878, on account of the death of a person, damages are to be computed with reference to the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased.

A railroad company does not owe a mere trespasser upon its track the duty of having an engineer running a train look to see if he is there; but if, after having seen him, an engineer does not exercise proper care to avoid striking him, the company is liable for the consequences.

The Carlisle and other similar tables, offered for the purpose of showing the "expectation" or probable duration of life, are to be received (if at all) on judicial notice of their genuineness and authoritativeness. No legal proof of genuineness or authoritativeness is required, but it is proper for a court to inform itself in the premises by reference to books or other sources of information. Such tables are not conclusive, but their value in a given case is largely analogical. They must speak for themselves, and not by the mouth of a witness merely testifying to their contents.

The probable duration of life is a proper element to be considered in estimating damages in an action under the statute before cited.

APPEAL from an order of the district court, Scott County.

Brown & Hawkins for respondent, Anton Scheffler, administrator, etc.

Peck & Little for appellant, Minneapolis & St. L. Ry. Co.

BERRY, J.—Under section 2, c. 77, Gen. St. 1878, the plaintiff, as administrator, brings this action to recover damages for the death of his son (18 months old) through the alleged negligence of defendant's locomotive engineer. Owing to the fact that another action was pending to recover for the loss by the plaintiff, as father, of the services of the deceased up to the age of 21 years, only such damages were claimed on the trial of the present action as would accrue to the plaintiff as next of kin by reason of the loss of such pecuniary benefits as he might (had his son lived) have received from him after his arrival at the age of 21 years. In this somewhat singular condition of things, the court, with reference to the amount of damages, after adverting to the fact that nothing was claimed for the time previous to 21, instructed the jury that the question for them to determine was "what a person in his (the deceased child's) condition of life would have accumulated (and that you can judge of by the parents, and the manner in which they were living); the amount which he would be likely to have accumulated over and above all expenses during life. Assuming that he would have lived that number of years" (meaning 40, which was testified to be the expectation of life of a person 21 years of age), "and had been a person of good health, what he would have been likely to have earned over and above his expenses, which would be in the nature of an accumulation that might have passed to his next of kin. They are the parties that represent his estate, and it would belong to them, and in all that can be included in it" (meaning, as we understand, in the damages). This was followed by an instruction that the damages must be of the character "already stated" to the jury, and "such only as would be acquired after this child had arrived at the age of 21 years."

Damages, in an action of this kind, are to be computed in reference to the reasonable expectations of pecuniary benefit from the continuance of the life of the deceased. *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103; s. c., 2 Am. & Eng. R. R. Cas. 185; *Opsahl v. Judd*, 30 Minn. 126. The instructions quoted go far beyond this rule. They virtually direct the jury to find damages to the amount of all the "accumulations," over and above expenses, which the deceased would probably have made for 40 years after he became 21 years of age; the probable amount of such accumulations to be judged of by reference to his parents and their mode of living. That this would not be an estimate or computation of damages in reference to the plaintiff's reasonable expectation of pecuniary benefit from the continuance of his son's life, is apparent upon the least reflection. Any estimate of the pecuniary benefit which will be derived by the next of kin from the continuance in life of a child who dies at the age of 18 months must be little, if any, better than mere guess-work; yet the stat-

ute appears to authorize an action even in such a case; but an estimate upon the basis that the child will turn over to his next of kin all his accumulations over expenses would violate all probabilities. For the error of these instructions there must be a new trial, in view of which we will briefly advert to one or two other errors apparent upon the record.

The child being a trespasser upon defendant's track, it was wrong to instruct the jury, as the court in effect did, that if, notwithstanding the child was upon the track through the carelessness of his mother, who had charge of him, yet, if he was "upon the track in such a way that the engineer could have seen" him, and by the exercise of proper care have avoided striking him, the defendant would be liable. The defendant did not owe the child—a trespasser—the duty of having its engineer look to see if he was upon the track, and therefore the fact that the engineer could have seen him if he had looked, does not make the company liable. If the engineer had seen him, and then had not exercised proper care to avoid striking him, there would have been a different case. *Locke v. First Div. St. P. & P. R. Co.*, 15 Minn. 350.

With reference to the admission of evidence of the Carlisle and other similar tables for the purpose of showing the "expectations" and probable duration of life, we think that they are to be received upon judicial notice of their genuineness and authoritativeness. As in regard to many other matters of which judicial notice is taken, it is proper for a court to inform itself in the premises by reference to books and other sources of information; but legal proof of such genuineness and authoritativeness is not required. In a given case it is for the court to say without such proof that they are or are not genuine or authoritative, and that they are or are not admissible accordingly. *Stephens*, Ev. art. 59, and note; 1 *Greenl. Ev.* § 6. Such tables are, however, not conclusive, for there is not only a considerable variance in different tables, but they are not so compiled as to show the probable duration of life under any and all circumstances, but under particular conditions, so that their evidentiary value in a given case is largely analogical. This will be more apparent upon reference to what is said of such tables in *Williams' Case*, 3 Bland, Ch. 186.

As in case of other documentary evidence, they must speak for themselves, and not by the mouth of a witness testifying to their contents (*Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280); and the probable duration of life is a proper element to be considered in estimating damages in an action of this character.

But in this case the question was not, as appears to have been supposed, what was the expectation of life of a person 21 years of age, but what was the "expectation of life" after the age of 21 years of a person 18 months old. *Walters v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 71. In the latter case the expectation is less than

in the former. As the case goes back for a new trial, and, as we imagine, upon a somewhat different basis than before, we pass the other matters alleged as error as not likely to occur again.

The order refusing a new trial is reversed, and a new trial awarded.

**Measure of Damages in Case of Death.**—In an action under a statute entitling a party to recover damages for injuries causing death, the measure of damages is the pecuniary value of the decedent's expectancy of life, taking into account his age, health, talents, position in life, and other circumstances. *Baltimore, etc., R. Co. v. Kelly*, 24 Md. 271; *Baltimore, etc., R. Co. v. Trainor*, 33 Md. 542; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Atlanta, etc., R. Co. v. Ayres*, 53 Ga. 12; *David v. Southwestern R. Co.*, 41 Ga. 223; *Catawissa R. R. Co. v. Armstrong*, 52 Pa. St. 282; *Denver, S. P. & P. R. Co. v. Woodward*, 4 Col. 1; *Kansas Pac. R. Co. v. Lundin*, 8 Col. 94; *Railroad Co. v. Barron*, 5 Wall. 90; *Market St. R. R. Co. v. McKeever*, 59 Cal. 294. s. c., *supra*; *Porter v. Hannibal & St. Jo R. Co.*, 2 Am. & Eng. R. R. Cas. 44; *Shabor v. St. P., M. & M. R. Co.*, 2 Am. & Eng. R. R. Cas. 185; *Atchison, T. & S. F. R. Co. v. Brown*, 6 Am. & Eng. R. R. Cas. 228; *East Tenn., etc., R. Co. v. White*, 8 Am. & Eng. R. R. Cas. 55; *Central R. & B. Co. v. Roach*, 8 Am. & Eng. R. R. Cas. 79; *East Tenn., Va. & Ga. R. R. Co. v. Toppins*, 11 Am. & Eng. R. R. Cas. 222.

**Life Tables.**—Standard life tables are admissible in evidence to show the expectancy of life. *Louisville, etc., R. Co. v. Mahony's Adm'r*, 7 Bush, 235; *Donaldson v. Mississippi, etc., R. Co.*, 18 Iowa, 280; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Walters v. Chicago, etc., R. Co.*, 41 Iowa, 71; *Sauter v. New York, etc., R. Co.*, 66 N. Y. 58; *Johnson v. Hudson River R. Co.*, 6 Duer 633; *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221; *Macon, etc., R. Co. v. Johnson*, 38 Ga. 409; *Georgia, etc., R. Co. v. Oaks*, 52 Ga. 410; *Burlington, C. B. & N. R. Co. v. Coates, Adm'r*, 15 Am. & Eng. R. R. Cas. 265.

But see, *contra*, *Armsworth v. Southeastern R. Co.*, 11 Jur. 158.

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VAWTER, Adm'r,

v.

MISSOURI PACIFIC R. R. Co.

(*Advance Case, Missouri. March, 1884.*)

The right of action for the death of a person caused by the wrongful act, neglect or omission of another is purely statutory, and statutes giving this right of action can have no extra-territorial effect. If such statutes are to be administered outside of the jurisdiction where enacted, this must be done on principles of comity. The weight of authority is to the effect that these statutes can be enforced only by the courts of the jurisdiction where the wrong is suffered and the right of action is given.

The statute of Missouri, R. S. 1879, § 97, expressly inhibits the prosecution by an administrator of a civil action for injuries to the person of the intestate; therefore an administrator appointed in Missouri will not be permitted to sue in this State under the statute of Kansas, for the death of the intestate in Kansas.

**APPEAL** from Moberly Court of Common Pleas.

Hon. T. J. Portis and H. S. Priest for appellant.

Hon. James Ellison for respondent.

**BLACK, J.**—Plaintiff is the widow of W. R. Vawter, and was appointed administratrix of his estate by the Probate Court of Schuyler County, Missouri. She brings this suit in her representative capacity, against the defendant, to recover damages for the death of her husband. He was in the employ of the defendant. While making a trip over the road, his train left the main track and ran on a side track, at Parsons, in the State of Kansas, came in collision with a stock train, and he was killed. His death, it is alleged, was caused by the negligence of defendant's servants in leaving the switch at that place in an improper position. Defendant contends that he and those engaged with him on his train were guilty of negligence in running the train at a rate of speed prohibited by the defendant's rules, because of which he was killed.

Civil actions for the death of a person caused by the wrongful act, neglect or omission of another, did not exist at common law. A right of action in such cases is given by the statute law of any of the States.

These statutes have no extra-territorial effect, so that, as is conceded in this case, the plaintiff, if she can recover at all, must do so by force of the statute of the State of Kansas, and not because of any statute of this State.

To that end she pleads, and bases her right to recover upon two sections of the statutes of that State, which are as follows:

"When the death of one is caused by a wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Also: "Every railroad company organized or doing business in this State shall be liable for all damages done to employees of such company in consequence of any negligence of its agents, or of any mismanagement of its engineers, or other employees, to any person sustaining such damages."

The question arises whether she can maintain this action in this State. The following authorities support her claim of right so to do.

Leonard v. The Columbia Steam Navigation Co., 84 N. Y. 48; Dennick v. Railroad Co., 103 U. S. 11; s. c., 1 Am. & Eng. R. R. Cas. 309. The first of these two cases is, in a large



degree, placed upon the ground that the statute of the State of Connecticut where the cause of action accrued, was in all material respects the same as that of New York. The other was also brought in the State of New York, though the action was founded on the statute of New Jersey. In both of these States it would seem the personal representative was the proper and only party to sue, in such cases. There is no material difference between the statute of the State of Kansas and that of the State of Illinois in the respect under consideration. The St. Louis Court of Appeals in *Steakman v. Terre Haute & Ind. R. Co.*, not yet reported, came to the conclusion that an administrator appointed in this State might prosecute such a suit under the statute of Illinois. In *Taylor v. The Pennsylvania Co.*, 78 Ky. 348, the death occurred in the State of Indiana. The administratrix of the estate of the deceased was appointed in the State of Kentucky, and brought her suit in the courts of that State, founding her right to recover upon the statute of the State of Indiana, which is precisely the same as the first of the sections of the statute of Kansas, above quoted. The court in that case denied the right and power of the administratrix to prosecute the suit in the courts of the State of Kentucky, and, among other things, said: "A Kentucky administrator, suing in a Kentucky court, must be able to show that the laws of Kentucky entitle him to the thing sued for. He cannot receive his office from one jurisdiction, and appeal to the laws of another jurisdiction for rights or power not given by the law which created him."

Other courts, where the same question was involved, have been equally positive in the assertions of the same doctrine. *Woodward v. The Michigan Southern & Northern Indiana R. Co.*, 10 Ohio St. 121; *Richardson v. New York Central R. Co.*, 98 Mass. 85. By the statute of Kansas, the right of action accrues to the personal representative, the executor or administrator. The damages enure to the exclusive benefit of the widow and children, or next of kin, and do not constitute the assets of the estate, but rather a trust fund for the designated persons.

Here the amount fixed is, in part of the nature of a penalty, and can only be recovered by designated relatives.

The rule of law which exempts the master from liability from damages, occasioned to one servant by the negligent act of a fellow-servant, is in force in this State, but by the statute of that State, so far as relates to employees of railroad companies, has been abrogated by the statute pleaded in this case. An administrator appointed in this case receives his power and authority to sue from the laws of this State, and from this State alone, to which he is amenable throughout the entire course of the administration.

There is no statute of this State by which he has or can have anything to do with suits of this character, or the damages when

recovered. He may, by sec. 96, Rev. Stat. 1879, bring an action for all wrongs done to the property, rights or interests of the deceased against the wrong-doer. Section 97 provides: "The preceding section shall not extend . . . to action on the case for injuries . . . to the person of the testator, or intestate of any executor or administrator.

For fear that sec. 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate, the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say, he may maintain such actions, and that, too, because of a statute of another State. In short, we must convert him into a trustee for the purposes entirely foreign to any duty devolved upon him as administrator by the laws of this State. This we cannot do. We understand a general law of the State of Kansas permits foreign administrators to sue and be sued in the courts of that State, and that he may there prosecute a suit under this damage act, if the law of the State from which he gets his appointment gives him like power. *Railroad Co. v. Cutler*, 16 Kas. 568. But if the law of the State where the appointment is made prohibits him from prosecuting an action for damages occasioned by the wrongful act of another, and resulting in death, then he cannot maintain the suit in the courts of that State.

This appears to be the result of a recent decision, a statement of which is given in the *Kansas Law Journal* of February 14, 1885.

Most courts and text-writers of acknowledged authority, hold that these actions given by statute, for causing death by neglect, default, or a wrongful act, can only be enforced by the courts of the jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory, and enforce the statute law of the State where the injury was suffered, though the action be not one of any general recognized right.

Others again entertain such actions when the laws of the two States upon the same subject are similar. If the statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity.

Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, i.e., to say to an administrator, you may sue in the courts of the State of your appointment under the law of another State when denied the right to bring the same, or a like suit by the laws of the State conferring the appointment.

Judgment of the trial court is reversed.

The other judges concur.

**General Reference.**—For a full statement of the law as to the point discussed in the principal case, see *Limekiller, Adm'x, v. Hannibal & St. Jo R. Co.*, and note, *infra*.

MORRIS, Adm'r,

v.

CHICAGO, R. I. AND P. R. Co.

(*Advance Case, Iowa. April 21, 1885.*)

An administrator may be appointed in Iowa for the purpose of bringing an action to recover damages for the death of his decedent, caused by the negligence of a railroad company in another State.

The appointment of an administrator is not void because the oath of office was taken and the bond signed before the appointment.

An administrator appointed in Iowa may maintain an action in the courts of that State against a railroad company to recover damages for negligence of the company causing the death of his decedent in the State of Illinois.

Where a right of action accrues by virtue of the statute of any State, the action may be maintained in any other state if not contrary to the public policy or law of the State where the suit is brought; and it is not essential that the statute should be precisely the same as that of the State where the action is given. It is sufficient if the statutes are of similar import and character.

APPEAL from Polk circuit court.

The plaintiff alleged in his petition that he had been duly appointed administrator of the estate of Michael Quigley, deceased, by the circuit court of Polk County, in this State, of which county said deceased was late a resident, and that said Quigley died at Rock Island, Illinois; that he was an employee of the defendant; and that he died from injuries received while coupling cars for the defendant at Rock Island. He further alleged the necessary facts showing that the deceased received the injury from which he died by reason of the negligence of the defendant, and without any contributory negligence on his part. The defendant, by its answer, denied the averments of the petition, and denied that the decedent was a resident of this State, and denied that plaintiff was administrator of his estate; averred that decedent was a resident of Illinois at the time of his death; and denied the right of plaintiff to maintain an action in the courts of this State for an injury causing the death of said Quigley in the State of Illinois. There was a demurrer to that part of the answer which raised the question as to the right of the plaintiff to maintain the action. The demurrer was sustained, to which defendant excepted. The cause was tried on its merits, and there was a verdict and judgment for the plaintiff.

Defendant appeals.

Wright, Cummins & Wright for appellant. Baylies & Baylies for appellee.

**ROTHBROOK, J.**—Counsel for appellant present three propositions in argument. The first is that the circuit court of Polk County had no jurisdiction to appoint an administrator of the estate of Michael Quigley, deceased. The argument is based upon the claim that the deceased left no estate within this State to be administered upon; that whatever claim existed against the defendant for damages for the death of Quigley arose under the law of Illinois, where the injury was received and where the death occurred; and that by the law of that State a right of action was not in the estate, but in the wife, husband, or next of kin, if there were any surviving. If it be correct, as claimed by appellant, that no right of action existed in this State, it is probably true that there was no estate upon which to administer. But if an action may be maintained in this State by an administrator, we think it necessarily follows that the circuit court had jurisdiction to make the appointment. And it is immaterial in such case whether the decedent was a resident of the State of Illinois or of this State. The power to appoint an administrator in this State for the sole purpose of collecting a claim due to the decedent, has been too long authorized and recognized to be now questioned, and we do not understand counsel to claim otherwise. The alleged want of power in the court to make the appointment is founded on the claim that there was no estate to be administered upon. As will be seen when we come to the third point in this opinion, we hold that the action may be maintained. The point now under consideration demands no further attention.

It appears from the record made in the appointment of the plaintiff as administrator that the application for the appointment was sworn to on the third day of July, 1882. The bond, and the jurat to the oath of the administrator indorsed thereon, were dated the same day. All these papers were filed in the circuit court on the fifth day of July, 1882, and on that day the bond was approved, the order of appointment made, and the letters of administration issued. It is urged that the appointment was void because the oath was taken and the bond made before the appointment. Section 2362 of the Code requires that an administrator must give a bond before entering on the discharge of his duties, and section 2363 provides that he must take and subscribe an oath of office. The bond is required to be approved by the clerk. We think that the signing of the bond and oath before the appointment did not affect the jurisdiction of the court. It is surely no valid objection to the action of the court that a party appears before it with a bond and oath already prepared. They are presented for the approval and action of the court, and it is wholly immaterial whether dated before or after the order of appointment. We think the record shows that the plaintiff properly qualified as administrator.

The next question presented by counsel for appellant is, Can an action be maintained in Iowa, by an Iowa administrator, upon this claim arising under the statute of Illinois? The statute of the State of Illinois authorizing actions for damages for the death of a person caused by the wrongful act, neglect, or default of another, is as follows:

"Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: provided, that every such action shall be commenced within two years after the death of such person."

Michael Quigley, the deceased, left a widow and parents surviving him, and it is not disputed that an action would lie in the State of Illinois by an administrator appointed in that State. The law expressly so provides. Under the law of this State, "when an act produces death the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts." Code, §§ 25, 26. It will thus be seen that in both States the administrator of the deceased is the proper party plaintiff in the action, and it seems to us to follow that in both jurisdictions the administrator is required to receive the amount recovered, and distribute it as provided by the respective statutes. By the statute of Illinois the assessment of the recovery is limited to \$5000. No such limitation is placed upon the statute of this State. By the statute of Illinois the recovery shall be for the exclusive benefit of the widow and next of kin of the deceased, while in Iowa the recovery shall be disposed of as other personal estate, except that it shall not be liable for the

payment of debts, if the deceased leaves a husband, wife, child, or parent. This distribution of the recovery by the administrator in this case would, therefore, be to the same persons as if the administration and action were had in the State of Illinois, and a judgment in this State would be a bar to an action in Illinois.

The plaintiff pleaded the statute of Illinois in his petition, and made his proof that the deceased left a wife and parents surviving him, and the court instructed the jury, in effect, that the recovery must be had as provided by the Illinois statute. The case differs from that of *Hyde v. Railroad Co.*, 16 N. W. Rep. 351, where we held that no recovery could be had in the courts of this State for an injury resulting in death in Missouri, because, in that case, recovery was claimed under the statute of this state, and we held that if an act of the character complained of, done in that State, did not create a liability, there was no liability anywhere.

In *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, where an action was brought in that State against the defendant by an administrator for damages for a wrongful act causing the death of the intestate in the State of Connecticut, it was held that the action could be maintained. The ground of the decision is that, although the right of action does not exist at common law, but was created by statute, yet it was transitory in its nature, and could be enforced in a foreign country where the laws of that country are of a similar nature. In other words, it is held that the action will lie unless the law and policy of the forum forbids its maintenance. The court said: "The rule here laid down is just and reasonable, and it is not essential that the statute should be precisely the same as that of the State where the action is given by law or where it is brought, but merely requires that it should be of similar import and character." It appears that there was such a law in the State of New York. In *Dennick v. Railroad Co.*, 103 U. S. 11; s. c., 1 Am. & Eng. R. R. Cas. 309, plaintiff, as administrator, brought suit in the State of New York to recover damages for the death of the intestate by an accident on the defendant's road in New Jersey. It was contended that the action would not lie because it was only cognizable in the courts of New Jersey. It was held that the action could be maintained, and the decision is placed upon the broad ground that the action is transitory, and may be maintained in any forum, and that the venue is immaterial. We think that it has been generally held that where a right of action accrues by virtue of a statute of any State, the action may be maintained in any other State, if not contrary to the public policy or law of the place where suit is brought. See *King v. Sarria*, 69 N. Y. 24; *Philips v. Eyre*, L. R. 6 Q. B. 1; *Wall v. Hoskins*, 5 Ired. Law, 177; *Herrick v. Minneapolis & St. L. R. Co.*, 11 Am. & Eng. R. R. Cas. 256; *Boyce v. Wabash Ry. Co.* *supra*. In the last-named case we cited with approval the cases of *Dennick v. Railroad Co.*



and Leonard v. Navigation Co., *supra*. It is not to be denied that there are cases not in accord with the rule of those above cited. See Woodward v. Michigan, S. & N. I. R. Co., 10 Ohio St. 121; Richardson v. New York Cent. R. Co., 98 Mass. 85; and McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46. The decisions in these and other cases relied upon by counsel for appellant we cannot approve, and we expressed our dissent from them in Boyce v. Wabash Ry. Co., *supra*.

It is not necessary that we should go further in this case than to hold that the action can be maintained because the recovery sought is in accord with our laws and the policy of our State; and yet we think, as is said in Dennick's case, *supra*: "It would be a very dangerous doctrine to establish that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred."

Affirmed.

**General Reference.**—For a full statement of the law as to the points discussed in the principal case, see Limekiller, Adm'x, v. Hannibal & St. Jo R. Co., and note, *infra*.

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LIMEKILLER, Adm'x, etc.,

v.

HANNIBAL AND ST. JO R. CO.

(*Advance Case, Kansas. January 7, 1885.*)

An administrator, appointed in another State, cannot maintain an action in this State under section 422, Code Civil Proc., where the law of the State from whence he derives his appointment prohibits him from instituting, maintaining, or prosecuting an action in his own State for damages resulting from the wrongful act or omission of another in causing the death of his intestate.

**ERROR** from the Atchison County.

Action brought by Johanna Limekiller, as administratrix of the estate of Frederick Limekiller, deceased, against the Hannibal & St. Joseph R. R. Co., to recover \$10,000 damages alleged to have resulted from the gross and wanton negligence of the railroad company in running one of its locomotives and trains upon and against the said Frederick Limekiller, in Wyandotte County, in this State, on May 27, 1881, thereby wrongfully causing the death of the said Limekiller. The amended petition was filed March 26, 1883. On May 4, 1883, the railroad company filed its answer as follows, omitting title and court:

"The said defendant, by B. F. Stringfellow, its attorney, comes

and says that said defendant ought not to have or maintain her said action against defendant, because defendant, for answer to said amended petition, says: (1) Defendant denies each and every allegation in said amended petition; (2) and for a second defence defendant says, if said Frederick Limekiller, named in said amended petition as plaintiff's intestate, was injured, as stated therein, such injury was not caused by any fault, negligence, or carelessness of said defendant, or any of its employees or agents, but was caused by the negligence and carelessness of said Frederick Limekiller directly and materially contributing thereto; (3) and for a third defence defendant says that said plaintiff has not legal capacity to maintain said action; (4) and for its fourth defence defendant says that plaintiff, as administratrix of the estate of the said Frederick Limekiller, by appointment of the probate court of Platte County, in the State of Missouri, is prohibited by the law of said State from instituting or prosecuting said action, and by the express provisions of a statute law of said State, as revised in 1879, and published by authority of said State, and in force at the time of the alleged death of said Frederick Limekiller, and at the time of the appointment of plaintiff as administratrix of the estate of said Frederick Limekiller, and at the time of the institution of this suit, and still in force under the title of 'of the administration of the estate of deceased persons,' and under sections 94, 96, 97, of article 5 of the statute, the actions which may be brought by administrators are specified, and then by section 97 of said article it is provided that the preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case, for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator; and so defendant avers that plaintiff is, by such law of said State of Missouri, prohibited from maintaining said action. Defendant, therefore, asks to be discharged, with costs. B. F. STRINGFELLOW, Attorney for the Defendant."

On August 3, 1883, the plaintiff filed her demurrer to the fourth defence set up in the said answer as follows (omitting title):

"Comes now the plaintiff and demurs to the fourth defence set up in the defendant's answer, on the ground that it does not state facts sufficient to constitute a defence to said petition, or any part thereof.

"W. A. HARNSEBERGER,

"BYRON SHERRY,

"WEBB & COCHRAN,

"Attorneys for Plaintiff."

On August 6, 1883, the demurrer came on for argument before the court, and, after hearing the argument of counsel for the respective parties, the court sustained the demurrer, the defendant

excepting. Thereafter the plaintiff filed its reply, which contained a general denial of each and every allegation set forth in the answer. Trial had at the March term, 1884, of the district court, when the jury made certain special findings of fact and rendered a verdict for plaintiff for \$4000. Thereupon the railroad company moved for judgment in its favor, upon the statements in the pleadings, which motion was, on March 15, 1884, overruled. The defendant also filed its motion to set aside the general verdict rendered in the cause, and for judgment in its favor upon the special findings of fact rendered by the jury. This motion was also overruled, and thereupon the defendant moved the court to vacate the verdict and grant a new trial. This motion was sustained, the court deciding that the special finding of fact No. 1, submitted by the plaintiff, and special finding of fact No. 39, submitted by the defendant, were conflicting, and not in harmony with each other; further, that the special finding of fact No. 39 was in conflict with the general verdict. The general verdict was thereupon set aside, and a new trial granted. Upon the trial it was admitted by the parties to the action, among other things, that the plaintiff was appointed administratrix of the estate of Frederick Limekiller, deceased, by the probate court of Platte County, Missouri, on July 8, 1881, and duly qualified as such, and entered upon the duties of such office.

The sections of article 5 of chapter 1 of the "act relating to the administration of the estates of deceased persons," referred to in the fourth defence of defendant's answer, as published in the Revised Statutes of Missouri, are as follows:

"Sec. 94. Executors and administrators shall collect all money and debts of every kind due to the deceased, and give receipts and discharges therefor; and shall commence and prosecute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him.

"Sec. 95. They shall prosecute and defend all actions commenced by or against the deceased at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator.

"Sec. 96. For all wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong-doer; and, after his death, against his executor or administrator, in the same manner, and with the like effect, in all respects, as actions founded upon contract.

"Sec. 97. The preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment; nor to actions on the case for injuries to the person of the plaintiff, or to

the person of the testator or intestate of any executor or administrator."

See 1 Rev. St. Mo. (1879) p. 16.

Section 2121 of chapter 25 of Revised Statutes of Missouri, 1879, reads:

"Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness, or criminal intent of any officer, agent, servant, or employee, while running, conducting, or managing any locomotive, car, or train of cars; or of any master, pilot, engineer, agent, or employee, while running, conducting, or managing any steamboat, or any of the machinery thereof; or of any driver of any stage-coach, or other public conveyance, while in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive, or car, or in any steamboat, or the machinery thereof, or in any stage-coach, or other public conveyance, the corporation, individual, or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer, or driver, shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage-coach, or other public conveyance, at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered—First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defence, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

Section 2122 reads:

"Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

Section 2123 reads:

"All damages accruing under the last preceding section shall be sued for and recovered by the same parties, and in the same man-

ner, as provided in section two thousand one hundred and twenty-one, and in every such action the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default." 1 Rev. St. Mo. 1879, pp. 349-351.

Section 422 of the Code of Civil Procedure of this state reads as follows:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow or children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

The plaintiff excepted to the ruling of the court in setting aside the verdict and granting a new trial. The defendant excepted to ruling of the court sustaining the demurrer, and also excepted to the charge of the court to the jury. Both parties bring error to this court, the plaintiff filing a petition, and the defendant a cross-petition in error.

Byron Sherry, W. A. Harnsberger and W. D. Webb for plaintiff in error.

B. F. Stringfellow for defendant in error.

HORTON, C. J.—Although the record in this case is an extensive one,—embracing 70 printed pages,—it is only necessary for us to refer to the ruling of the district court upon the plaintiff's demurrer to the fourth defence set up in the amended answer of the railroad company. This, in our view, is decisive of the case. The plaintiff is the administratrix of the estate of the deceased, under appointment from the probate court of Platte County, in the State of Missouri. She is an officer of the law of the State of her appointment, and therefore her powers are limited by the statutes of Missouri, and they cannot be changed or enlarged by the authority of the laws of this State, nor by any judicial construction of our courts. An administratrix takes only such powers as are conferred by law; she is merely an agent or trustee acting immediately under the direction of the law regulating her conduct and defining her authority. *Collamore v. Wilder*, 19 Kan. 67. In this State the remedy, when death ensues from the wrong done, is by action in the name of the personal representative of the deceased, and the amount recovered will be for the benefit of the

widow or children, if any, or next of kin. *City of Atchison v. Twine*, 9 Kan. 350; Code, § 422. In Missouri the personal representative of the deceased has no power to institute an action of this character. In that State the action is to be brought—First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. 1 Rev. St. Mo. 1879, §§ 2121–2123, pp. 349–351.

The fourth defence of the answer alleges that the administratrix of the estate of the deceased is prohibited by the law of the State of Missouri from instituting, maintaining, or prosecuting such an action. 1 Rev. St. Mo. 1879, §§ 94–96, c. 1, art. 5, p. 16. See, also, sections 2121–2123, *supra*. If the death of the deceased had been caused by the wrongful act of the defendant in Missouri, plaintiff, as administratrix, could not have maintained this action in that State, and as administratrix, she is not entitled to any greater power or rights in Kansas than she is in Missouri, under the statutes of which State she holds her appointment. This action was therefore improperly brought by the plaintiff as administratrix of the estate of Frederick Limekiller, deceased, and the court erred in sustaining the demurrer. *McCarthy v. Railroad Co.*, 18 Kan. 46; *Land Grant Ry. Co. v. Commissioners Coffey Co.*, 6 Kan. 245.

On the part of the plaintiff it is contended that the right of a foreign administratrix to maintain such an action as this has been settled in *Railway Co. v. Cutter*, 16 Kan. 568, and *Perry v. Railway Co.*, 29 Kan. 420. The decision in *Railway Co. v. Cutter*, *supra*, and the language used in *Perry v. Railway Co.*, *supra*, referring to the right of a foreign administrator or administratrix to prosecute in the courts of this State an action of this nature, was based upon the supposition that the authority of the foreign administrator or administratrix was the same under the statute of the State where appointed as under the laws of this State, and therefore, under the rules of comity, a foreign administrator was allowed to exercise in this State all the powers which he or she exercised in his or her own State, not repugnant to the laws, nor prejudicial to the interests of this State. But it has never been decided by this court that on account of courtesy, or for any other reason, a foreign administrator or administratrix could exercise in this State powers which he or she could not exercise in his or her own State. *Land Grant Ry. Co. v. Commissioners Coffey Co.*, *supra*. In the case of *Railway Co. v. Cutter*, *supra*, the law of Colorado, relating to administrators, was not pleaded in the answer, or referred to in the case. That decision was rendered upon the theory that the Colorado statute contained a provision similar to section 422 of our



**Code.** In *Perry v. Railway Co.*, the *supra*, language of the court, "that an administrator appointed in another State can maintain an action in this State under section 422 of the Code," was based solely upon the authority of *Railway Co. v. Cutter*, *supra*.

Finally, if it be urged that under this construction of the law, and the decision of *Perry v. Railway Co.*, 29 Kan. 420, there can be no party having a legal right to maintain an action of this character, where a resident of another State, whose death is caused by the wrongful act of another in this State, dies without leaving any estate or assets in this State, we answer that we do not make the law. If there is any omission in the statutes, the remedy is with the legislature. Instead of requiring the instituting of an action in the name of the personal representative of the deceased, where death ensues from the wrong done, the legislature can authorize an action to be maintained in the name of the widow or children, if any, or in the name of some one next of kin to the deceased. The order of the district court sustaining the demurrer was erroneous, and therefore the judgment must be reversed, and the cause will be remanded for further proceedings in accordance with the views herein expressed.

All the justices concurring.

**Right of Railroad Company to Object to Granting of Letters of Administration.**—When a railroad company is sued by the administrator of a party deceased for causing his death, it may defend upon the ground that there has been no jurisdiction to grant the letters of administration to the plaintiff. *Jacobs v. Louisville & N. R. Co.*, 10 Bush (Ky.), 263; *Welch v. New York Central R. Co.*, 53 N. Y. 610; *Perry v. St. Joseph & W. R. Co.*, 29 Kans. 420.

But see, *contra*, *Holmes v. Oregon & Cal. R. Co.*, 7 Sawy. 380.

The mere expectancy by a railroad company of the institution of suit against it by an administrator does not entitle it to object to the granting of letters to such administrator. *Augusta & Somerville R. Co. v. Peacock*, 56 Ga. 146. But when suit has once been brought the railroad company may petition to have the letters revoked. *Jeffersonville R. R. Co. v. Swayne's Adm'r*, 26 Ind. 477.

**Claim for Damages for Causing Death is not Assets Entitling Party to Letters of Administration.**—Where the decedent has not died domiciled in a State and has no assets therein, the existence of a claim for damages for causing his death is not sufficient to authorize the granting of letters of administration upon his estate. *Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477; *Perry v. St. Joseph & W. R. Co.*, 29 Kans. 420; s. c., 11 Am. & Eng. R. R. Cas. 603; *Illinois Central R. Co. v. Cragin*, 71 Ill. 177.

But see, *contra*, *Hartford, etc., R. Co. v. Andrews*, 36 Conn. 213.

**Suits by Foreign Administrators.**—An administrator appointed by a foreign State may ordinarily institute an action to recover damages for causing the death of his decedent. *Kansas Pacific R. Co. v. Cutter*, 16 Kans. 568; *South Carolina R. R. Co. v. Nix*, 68 Ga. 572; *Wabash, St. L. & P. R. Co. v. Shacklett*, 105 Ill. 364; s. c., 12 Am. & Eng. R. R. Cas. 166.

But see, *contra*, *Vawter, Adm'r, v. Missouri Pacific R. Co.*, *supra*; *Morris, Adm'r, v. Chicago, R. I. & P. R. Co.*, *supra*. But see *Limekiller, Adm'r, v. Hannibal & St. Jo R. R. Co.*, *supra*.

**Action for Causing Death is purely Local.**—But it is well established that

the action is local in its nature and hence no recovery can be had under the statute of a State except for injuries occurring within the State. *Woodard, Adm'r, v. Mich. S. & N. I. R. Co.*, 10 Ohio St. 121; *McCarthy, Adm'r, v. Chicago, R. I. & P. R. Co.*, 18 Kans. 46; *Hover v. Pennsylvania Co.*, 25 Ohio St. 667; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Nashville, etc., R. Co. v. Eakin*, 6 Coldw. (Tenn.) 582; *Vanderwerken v. New York, etc., R. Co.*, 6 Abb. Pr. 239; *Beach v. Bay State, etc., Co.*, 10 Abb. Pr. 71; *State v. Pittsburgh, etc., R. Co.*, 45 Md. 41; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Mackay v. Central R. Co.*, 4 Fed. Rep. 617; *Taylor v. Pennsylvania Co.*, 78 Ky. 348; s. c., 7 Am. & Eng. R. R. Cas. 23; *State v. Pittsburgh & Connellsville R. Co.*, 45 Md. 41; *Chicago, etc., R. Co. v. Doyle*, 8 Am. & Eng. R. R. Cas. 171; *Hyde v. Wabash, St. L. & P. R. Co.*, 15 Am. & Eng. R. R. Cas. 503.

An administrator appointed in another State cannot recover unless he is entitled to do so by the law of the State where suit is brought. *Taylor's Adm'r v. Pennsylvania Co.*, 7 Am. & Eng. R. R. Cas. 23.

The cause of action arises at the place where the death occurs and not at the place of the appointment of the administrator. *Lung Chung, Adm'r, v. Northern Pacific R. Co.*, 16 Am. & Eng. R. R. Cas. 548.

**Suit in one State under Statute of another State.**—Causes of action arising under the statutes of one State may be enforced in the courts of another when the laws of both States are substantially the same and the action is not opposed to the general policy of the State in which suit is brought. *Selma, etc., R. Co. v. Lacey*, 43 Ga. 461; *Western, etc., R. Co. v. Strong*, 52 Ga. 461; *Stallknocht v. Penna. R. Co.*, 53 How. Pr. 305; *Richardson v. New York, etc., R. Co.*, 98 Mass. 85; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; s. c., 8 Am. & Eng. R. R. Cas. 171; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Dennick v. Central R. R. of N. J.*, 108 U. S. 11; s. c., 1 Am. & Eng. R. R. Cas. 309; *Chicago, etc., R. Co. v. Doyle*, 8 Am. & Eng. R. R. Cas. 171; *Patton v. Pittsburgh, C. & St. L. R. Co.*, 96 Pa. St. 169; s. c., 11 Am. & Eng. R. R. Cas. 658; *Morris, Adm'r, v. Chicago, R. I. & P. R. Co.*, *supra*.

But see *Commonwealth v. Sanford*, 12 Gray (Mass.), 124; *Illinois Central R. Co. v. Cragin, Adm'r*, 71 Ill. 177.

A right of action for causing the death of a human being given by a State statute may be enforced in the United States courts. *Holmes v. Oregon, etc., R. Co.*, 5 Fed. Rep. 75.

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## STREET R. R. Co.

v.

NOLTHENIUS.

(40 Ohio State Reports, 376.)

In an action for an injury alleged to have been caused by the negligence of the defendant, it is not necessary to allege in the petition that the injury was caused without the fault or negligence of the plaintiff, unless the other averments necessary to state a cause of action suggest the inference that the plaintiff may have been guilty of contributory negligence.

Where an action was brought for an injury received by falling into a trench which had been dug in a public street for the purpose of laying or repairing the track of a street railroad, the opinion of a witness for the plaintiff that the condition of the trench and track was dangerous, was not

competent. But after the defendant, on cross-examination, had called out the opinion of the witness, that the condition, as he claimed it to be, of the trench and track was not dangerous, it was not error to permit the witness on re-examination to state his opinion that the condition, as claimed by the plaintiff, of the trench and track was dangerous.

**ERROR to the District Court of Hamilton County.**

The defendant in error filed his petition in the common pleas, in which he charged: "That on or about the 28th day of February, A.D. 1877, the said defendant did, by its agents and servants, dig and open a ditch or trench on Elm Street and McMicken Avenue, at the point where they intersect, both being public streets, in the city of Cincinnati, Hamilton County, Ohio, and did then carelessly and negligently permit said ditch or trench to remain open and uncovered, and without fixing any light of warning or barrier at or near the same. And plaintiff further says that in consequence of the negligence and carelessness aforesaid of the defendant, in passing along said streets in the early evening of said day, he accidentally fell into the said ditch or trench and broke his right leg, and was badly hurt, whereby he became lame and diseased, and so remained up to the present time, and still is and will be permanently lame and weakened. That he has been ever since said injury, and still is prevented from attending to his necessary and ordinary business and labor, to his loss and damage to the present time in the sum of \$1500, and has been put to and incurred great expense, to-wit: to the sum of \$1000 for medical services and attendance in and about trying to get healed and cured of his said injury, and that he has been put to great pain and suffering, and has received permanent injury from said fall, and that he has thereby suffered further damages in premises in the sum of \$5000.

To this petition the defendant answered by a general denial.

On the trial the plaintiff called one John Bradley as a witness, and on cross-examination the defendant asked him this question:

Q. Is there any custom or usage as to the manner of protecting against excavations when left during the daytime, and if so, what is ordinarily done?

To which the witness answered:

A. If it is a dangerous place, either put up a fence around it or keep watch.

The defendant then asked the question:

Q. Now, explain what you mean by dangerous obstructions—that you set a watchman to watch in the daytime even; suppose it consisted of such a place where they had taken up a pavement for the purpose of relaying it, anything of that kind—preparing by taking the pavement wholly up and laying the old paving block on the side of the street, and for some reason or other, going to dinner, anything of that kind, in the daytime, leaving the place where they had cut out the width of the boulder or blocks, what would

you say about that being a dangerous excavation, that you would leave a watchman or put a fence around it in the daytime?

A. No; I would not leave a man there, excepting to protect the street from being torn up.

Q. You would not regard that as a dangerous excavation requiring a watchman or a fence?

A. No, sir.

The plaintiff then on re-examination asked the question:

Q. Supposing that the street is left in a condition to put boulders in and there are two tracks upon the road bearing the same relation to each other as this, now state whether or not, in your judgment, it would be dangerous to leave it open there, with the tracks in that way—leave it open in the way, say it is open for the purpose of putting in boulders.

To which the witness answered:

A. Yes, that would be dangerous; anything of that kind we would put a fence or timber across it, and stop the travel there.

All of the examination of this witness was objected to and objections overruled, and exceptions.

Upon the trial the plaintiff recovered a judgment, which was affirmed by the district court.

**McCAULEY, J.**—This case presents two questions. First, was it necessary that the plaintiff should have alleged in his petition that he received the injuries complained of without fault or negligence on his part, and second, was it error to admit the opinion of the witness Bradley on his re-examination that the condition of the street and railroad track was dangerous. The general rule is that contributory negligence is matter of defence. This is a rule of pleading as well as of evidence. It has been frequently held that where the evidence of the plaintiff raises a presumption of his negligence contributing to the injury, the burden is upon him to remove the presumption before he can recover. *Railroad Co. v. Whitacre*, 35 Ohio St. 627; *Hays v. Gallagher*, 72 Pa. St. 140; *Robinson v. Gary*, 28 Ohio St. 241.

If the plaintiff in the averments of his petition necessary to state his cause of action, by reason of his relation to the defendant as agent, employee or otherwise, suggests the implication of negligence on his part, that implication must be negatived by an allegation that he was without fault. *Railroad Co. v. Barber*, 5 Ohio St. 541. But where the relation between the parties does not require of the plaintiff any duty toward the means from which the injury resulted beyond ordinary care to avoid injury, no such averment is necessary. Where nothing more than ordinary care is required that degree of care will be presumed.

In this case the plaintiff was passing along a street and had no relation with the defendant requiring him to observe more than

that ordinary care that is at all times required to avoid injury. The averment, therefore, that he was without fault, would be an averment of that which would be presumed and was not necessary.

As to the other question that the witness Bradley in answer to a question by counsel for plaintiff, gave it as his opinion that the street in a condition supposed to exist when the injury occurred, was dangerous. If this opinion had been given by the witness in his testimony in making the case of the plaintiff, it would have been improper and its admission would have been error. But the opinion was given in re-examination after the defendant had asked the witness whether the street was dangerous in a condition which he claimed to have existed at the time of the injury, and the witness had answered that it was not. After the witness had thus answered, counsel for plaintiff asked him whether or not the street was dangerous in a condition claimed by the plaintiff at the time of the injury, to which he answered that in that condition it would be dangerous. The witness in his examination in chief had said that if the street was in a dangerous condition, it should have been fenced up or guarded; but had not said whether it was dangerous or not, until he was asked by the defendant, and then only stated that in the condition supposed by the defendant it would not be dangerous.

After the defendant had gone beyond the proper limits of a cross-examination, and had called out an opinion of the witness favorable to his claims in the case, it was not error to permit the plaintiff to re-examine on the same matters. 1 Greenleaf's Evidence, sec. 468; *Clipper v. Logan*, 18 Ohio, 375; *Taylor v. Boggs*, 20 Ohio St. 516..

Judgment affirmed.

**Complaint Need not Negative Contributory Negligence.**—Where the nature of the accident in question would not ordinarily suggest an influence of contributory negligence, it is generally not necessary to place in the declaration or complaint a specific denial of its existence. *Louisville, etc., R. Co. v. Murphy*, 9 Bush, 522; *Slattery v. Dublin, etc., R. Co.*, L. R. 3 App. Cas. 1155; *Hackford v. New York, etc., R. Co.*, 6 Lans. 386; *Corey v. Bath*, 35 N. H. 530; *Hill v. New Haven*, 37 Vt. 501; *Mobile & M. R. Co. v. Crenshaw Co.*, 9 Am. & Eng. R. R. Cas. 340; *Fowler v. Baltimore & Ohio R. Co.*, 8 Am & Eng. R. R. Cas. 480.

**Rule in Indiana.**—In Indiana it is well settled that the complaint must distinctly set out the fact that the plaintiff has been free from contributory negligence. *Wright v. Indianapolis, etc., R. Co.*, 18 Ind. 165; *Jeffersonville, etc., R. Co. v. Hendricks*, 26 Ind. 228; *Toledo, etc., R. Co. v. Berin*, 26 Ind. 443; *Indianapolis, etc., R. Co. v. Robinson*, 35 Ind. 380; *Jeffersonville, etc., R. Co. v. Underhill*, 40 Ind. 229; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 43; *Hildebrand v. Toledo, etc., R. Co.*, 47 Ind. 399; *Ream v. Pittsburg, etc., R. Co.*, 49 Ind. 93; *Jeffersonville, etc., R. Co. v. Lyon*, 55 Ind. 477; *Gormley v. Ohio, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 581; *Cincinnati, etc., R. Co. v. Peters*, 6 Am. & Eng. R. R. Cas. 126.

**LITTLE ROCK AND FORT SMITH RY. CO.**

v.

**BARKER et ux.**

(89 *Arkansas Reports*, 491.)

When a special judge, elected in the absence of the regular judge, is disqualified in a particular case, another special judge may be elected for that case.

It is the settled ruling of this court that the Circuit Court cannot, under the provision of our Constitution, determine the sufficiency of evidence, and direct the jury what verdict to find, when there is any evidence tending to sustain the issue.

A verdict for excessive damages may be cured by release of the excess, in actions for torts, as well as in actions on contracts.

In an action against a railroad company in which damages are claimed for the death of a child incapable of earning anything, or rendering service of any value, the value of its probable future services to the parent during its minority, is a matter of conjecture, and may be determined by the jury without the testimony of witnesses.

Our statute does not, and could not, under our Constitution, limit the recovery of damages for injuries resulting in death, or for injuries to persons or property. But a jury is not without restraint, and if its assessment be so enormous as to shock the sense of justice, and to indicate that the verdict is the result of prejudice or passion, the Circuit Court should set it aside; and, if it refuse, this court will reverse the judgment.

APPEAL from Lonoke Circuit Court.

Clark & Williams for appellant.

W. F. Will and S. P. Hughes for appellee.

ENGLISH, C. J.—This case has been here before, and is reported in 33 Ark. 350, etc. The judgment was reversed on that appeal, and the cause remanded for a new trial. There was a new trial, which resulted in a verdict and judgment for the plaintiffs, and defendant again appealed. The clerk of the court below, in making out the transcript on this appeal, has copied into it the opinion of this court rendered in the former appeal, a copy of which was sent down with the mandate of reversal, as a guide to the court below, in its subsequent proceedings in the cause.

One of the rules of practice adopted by this court as early as 1837, and which has never been repealed, provides that "when a cause has been once before the court of appeals, and a transcript is again called for, to have errors which occurred after its return corrected, the second transcript should begin where the former ended, omitting the opinion of the appellate court," etc. 1 Ark. Rep. 9.

The reason for the rule is obvious. The opinions of this court are recorded here, and published in the Reports, and it is useless to copy them into transcripts on second appeals.



The clerk of the court below is among the most experienced and skilful clerks of the State, and rarely fails to comply with the rules of this court in making out transcripts. He has committed an error, however, in copying the opinion of this court into the transcript on this appeal, and will be allowed no costs for so much of the transcript.

The trial involved on this appeal occurred during the September term, 1879, of the Circuit Court of Lonoke County. The record shows that on Monday, the fifteenth day of September, 1879, a day of said term, the Hon. Joseph W. Martin, the regular judge of the court, not being in attendance, Hon. Sam W. Williams was duly elected special judge, to preside during the remainder of the term, or until the appearance of the regular judge.

That the special judge so elected to hold the court in the absence of the regular judge, being an attorney in this cause, and being disqualified to preside at its trial, Hon. John Hallum was elected special judge to try the case, qualified, and the case was tried before him. The appellant objected to his competency to sit as judge in the case, which was overruled, and the objection was again made in a motion in arrest of judgment, and again in the motion for a new trial, and overruled.

The objection is that there could not be two special judges at the same time.

The first special judge was elected to hold the court in the absence of the regular judge. He had the general powers, and was in the place of the regular judge during his absence. But he was disqualified to preside in a particular case—this case—and a special judge was elected to try it. Section 21, article 7, of the Constitution seems broad enough to provide for the two emergencies.

The cases cited by counsel for appellant on this point have no application whatever to the appointment of special judges.

It was made ground of the motion for a new trial that the verdict was contrary to the evidence and the instructions of the court.

It is sufficient to say of this ground that there was some evidence to sustain the verdict.

Plaintiffs moved for ten instructions, to each and all of which defendant objected, but the court gave them, and defendant excepted to the ruling of the court, and made the giving of these instructions ground of the motion for a new trial.

On the former trial thirteen instructions were given for plaintiffs, and such of them as were specifically objected to were reviewed on the first appeal, and held to be substantially correct announcements of law. The ten given on the second trial for plaintiffs, and now before us, were substantially taken from the series of thirteen given on the first trial, and so reviewed. They

are in harmony with the opinion of this court on the former appeal, and must be treated as the law of the case, the evidence on the two trials, as to negligence and contributory negligence, not being materially different.

Defendant moved ten instructions. The plaintiffs objected to the first, fifth and ninth of them, but consented to the giving of the others, and the court refused the first and ninth, and also refused the fifth as formulated, but gave it in a modified form, and defendant excepted to the ruling of the court, and made it ground of the motion for a new trial.

The first was: "The court instructs the jury that there is not evidence sufficient in law in this case to sustain a verdict for plaintiffs upon the point of negligence on the part of the defendant railroad company, and the jury are directed to bring in a verdict for the defendant."

It was said in the opinion on the former appeal, that the court could not have given such an instruction without encroaching upon the province of the jury, if there was any evidence tending to prove the issue on the part of the plaintiffs. 33 Ark. 370.

This court has repeatedly decided, and it must be regarded as settled, that such an instruction cannot be given, where there is any evidence tending to sustain the issue, under the provision of the Constitution that "judges shall not charge juries with regard to matters of fact, but shall declare the law." Section 23, article 7.

There was some evidence in this case tending to prove the issue on the part of the plaintiffs.

It may be seen by reference to the opinion delivered on the former appeal, that the action was brought by Emma O. Ammon, then a widow, who, pending the suit, intermarried with Barker, and he was joined with her as a co-plaintiff. That the object of the suit was to recover damages of the defendant corporation for the killing of her son, Alpheus D. Ammon, a child five years old.

The death of the child was alleged to have been caused by the negligence of the servants of defendant who were in the management of the train which ran over and caused its death, in the town of Argenta, about the twenty-sixth of April, 1875. The answer denied negligence on the part of defendant's servants, and alleged contributory negligence on the part of the plaintiff's mother, as the proximate cause of the death of the child.

To show that there was some evidence tending to prove the issue on the part of plaintiffs, T. S. Diffey, witness for plaintiffs, testified, in substance, that he was an engineer and machinist, and had run as engineer on trains about seven years. That on the twenty-sixth of April, 1875, he was foreman of defendant's railroad shops in Argenta, and lived in the house occupied by Mrs. Ammon, which was twenty-five or thirty yards from the railroad track. The place where the accident happened was from two hundred and

fifty to three hundred yards from the house. He was standing in the door of the railroad shop, which was about ninety yards from where the child was run over. There were three tracks there, and the child was between the middle and the left-hand track as you go west, or north. The child then was facing the middle track, upon which the train was running. The tracks were about four to five feet apart. Witness heard the whistle of the engine, and this attracted his attention to it. The engine was then two hundred and twenty or two hundred and forty feet from the child, and was running twelve to fifteen miles an hour. He supposed the engineer saw the child, from the whistle being blown in an unusual place. Shortly after witness saw it between the tracks, it got on the track upon which the engine was running, but in the mean time the engine had run some distance—say seventy to eighty feet. Witness supposed the engineer saw the child, from the whistle being blown. He thought there was no danger, because the engineer had ample time to stop the train. Had it not been for this, he would have run and caught the child. When the child got on the track, and about the middle of the track, which was but an instant from the time he first saw him, the cattle-alarm sounded. The first whistle was only a signal, and did not call to brakes. The cattle-alarm calls to the brakes, and also warning brakemen and all others that there is something on the track ahead of the train. Could not say when the engineer reversed the engine, but when within about fifteen or twenty feet of the child, he gave her steam on the back motion. Applying steam on back motion, if the engineer applies it right, with a sanded track, will hold back more than half a dozen brakes, when the engine is going ahead.

When the engine struck the child, it was on the right-hand rail, having passed across the track diagonally about eight feet. All the wheels of the engine passed over the child, but not those of the tender. The engine ran about eighteen feet after it struck the child before it fully stopped. The child was taken out from between the engine and tender, carried home, and died about eight o'clock that night. The engine was light, weighing from twenty-six to twenty-seven tons. The tender weighs eleven tons. The train had two coaches attached to it. The engineer could have seen the child on the track, say five hundred feet. There were no cars on the side-track to obscure the view. The child was about midway between the tracks when the whistle first sounded. The train was about one hundred and twenty-five feet long. The train could have been stopped in one hundred feet, by putting down brakes, reversing the engine, giving steam, and sanding the track. The engine was from one hundred and forty to one hundred and sixty feet from the child when it got on the track. One whistle was blown before it got on the track, etc. After the child got on the track and the breaks were whistled down, the agents on

the train, used, in his opinion, all the means within their reach to stop the engine and save the child, but they did not use some of the means soon enough, and did not sand the track at all as he saw. They may have reversed the engine in time, but did not put on steam until they got within fifteen or twenty feet of the child. It was not prudent to fail to put on steam as soon as the engine was reversed, etc.

There was much more and conflicting evidence, but the above is sufficient to show that the court properly refused the first instruction moved for defendant, which would have withdrawn from the jury the consideration of the facts, and obliged them to return a verdict for defendant.

The ninth instruction was as follows: "That the action in this case is for damages sustained by the mother, the plaintiff, for injury to the child by loss of service, and her contributory negligence as a question of law, in permitting the child to be at large and trespass upon the defendant's track, at that time and place, is a bar to her recovery, and the jury must find for the defendant."

This instruction was properly refused. It assumes that the mother was guilty of contributory negligence, which was a question of fact for the jury (Field on Damages, sec. 188), and upon such assumption, as matter of law, declares it to be a bar to her recovery, and directs the jury to find for the defendant. *St. L., I. M. & S. R. Co. v. Freeman*, 36 Ark. 51.

The tenth instruction on the same subject, which the court gave, was sufficiently favorable to defendant. It was: "That if the jury believe that the mother of the child was guilty of negligence in permitting the child to be upon the railroad tracks, where it ought not to be, and that such negligence was the proximate cause of the injury, they must find for defendant."

The fifth instruction as moved by defendant, and refused by the court, follows: "The sole necessity for the exercise of any care or diligence toward the child, Alphens Ammon, was occasioned by his getting on the track ahead of the train, and unless the jury find from the evidence that the child was known to be in danger by the company's agents on the train, in time to have avoided the injury by the use of proper care and diligence, they will find for defendant."

The court gave the instructions in a modified form as follows:

"The sole necessity for the exercise of any care or diligence towards the child, Alphens D. Ammon, was occasioned by his getting on the track ahead of the train, and unless the jury find from the evidence that after the child was known to be in close proximity to the track and approaching it ahead of the train, in time to have prevented the injury by the exercise of due diligence and care, they will find for the defendant."

The modification made the instruction more definite and intellig-

ible, and was founded upon the special evidence in the case. The danger indeed existed whilst the child was playing in the proximity of the track, and the engineer should have begun his precautions, if he did not, when the child was first discovered in so perilous a position.

Upon the whole the instructions given for plaintiffs, and such as were given for defendant, fairly submitted to the jury the question of negligence on the part of the defendant, and contributory negligence on the part of the mother of the child.

It was made ground in the motion for a new trial, that the damages awarded were excessive.

It was proved that Mrs. Ammon, the mother of the child, Alpheus D., was a widow at the time it was killed; that she was poor, and kept boarders for a living. Alpheus D., was her only child, he was five years old, smart, healthy, intelligent, large for his age, and obedient. The physician's bills and funeral expenses were \$290.

The jury returned a verdict for \$3500 damages.

On the return of the verdict, plaintiffs offered to remit, and were permitted by the court, against the objection of the defendant, to remit \$1235 of the damages assessed by the jury, and judgment was rendered for the balance, \$2265.

Defendant then filed the motion for a new trial, on the grounds indicated above, and also made it ground of the motion that the court erred in permitting plaintiffs to remit part of the damages assessed as stated above.

The sixth instruction moved for defendant, and given by the court, related to the measure of damages, and was as follows:

"That if plaintiff is entitled to recover at all, upon the evidence, the measure of damages is, first, reasonable funeral expenses; second, such doctor bills and other expenses as were necessarily incurred and paid in taking care and giving attention to the child after it was hurt, and before it died; third, such amount as the child would have earned for its mother previous to its arrival at the age of twenty-one years, after deducting the cost of boarding and clothing and educating the child in a manner suitable to its station in life. Nothing for suffering or bereavement of the mother is allowed."

And on the same subject the court of its own motion, and without objection, instructed the jury as follows: "The law affords the bereaved mother no compensation for the loss of the companionship and association of the child, nor for the grief which she suffered on account of its death, and if the jury should find for plaintiff they will not be warranted in finding a verdict for a sum disproportionate to, or in excess of the probable pecuniary loss of the parent occasioned by the death of the child. Reasonable damages only, in view of all the circumstances in evidence, should

be awarded, and this only in the event the jury are satisfied that the death of the child was caused by the negligence of the defendant or its agents and employees."

There appears to have been no controversy about the bills of the physicians, and the funeral expenses, which amounted to \$290. Deduct this sum from the \$2265 for which judgment was rendered, and there remains \$1975 as compensation to the mother for the probable loss of the services of the child from the time of its death to its majority, a period of sixteen years.

It is submitted for appellant that the court erred in permitting plaintiffs to remit part of the damages assessed by the jury, and that in considering the question of excess of damages, we must treat the verdict as standing for \$3500. That the rule permitting remittiturs applies only in actions *ex contractu*, and not in actions *ex delicto*, etc., where there is no fixed standard by which the court can measure the proper amount of damages to be recovered.

In *Collins v. Albany & Schenectady R. R. Co.*, 12 Barbour, 492, the action was to recover damages for injury sustained by the plaintiff, in consequence of a collision upon the defendant's road, and there was a verdict for \$11,000 damages, and motion for a new trial on the ground that the damages were excessive. The court said: "It is undoubtedly a proper case for allowing those who represent the plaintiff to elect, if they will, to remit a portion of the damages, instead of awarding a new trial absolutely. This is often done in actions upon contracts, where the recovery has been too large, and I can see no objection in principle to the adoption of the same practice in actions of torts. Such a practice is not without precedent. In *Blunt v. Little*, 3 Mason, 104, the action was for malicious prosecution, and the plaintiff recovered a verdict for \$2000. Judge Story, before whom the case was tried, upon a motion for a new trial, on the ground that the damages were excessive, said: 'It appeared to me at the trial, a strong case for damages; at the same time I should have been better satisfied if the damages had been more moderate. I have the greatest hesitation in interfering with a verdict, and, in so doing, I believe that I go to the very limits of the law. After full reflection, I am of opinion that it is reasonable that the cause should be submitted to another jury, unless the plaintiff is willing to remit \$500 of his damages. If he does, the court ought not to interfere further.'"

"In *Diblin v. Murphy*, 3 Sanford, S. C. Rep. 19 (which was an action for damages for a personal injury), the court made an order setting aside the verdict, on payment of cost, unless the plaintiff would stipulate to reduce the verdict from \$1500 to \$600. So, in *Armitage v. Haley*, 4 Ad. and Ellis, N. R. 917, 4 Queen's Bench R. (which was an action to recover damages for personal injuries), the verdict being for one farthing damages, the court made an



order for a new trial, unless the defendant would consent to increase the damages to the amount of the surgeon's bill.'"

"I think the proper order in this case is, to deny the motion for a new trial, if within twenty days a stipulation is given to reduce the verdict to \$5000. And if such a stipulation is not given, that a new trial be awarded upon payment of costs."

So in *Clapp v. The Hudson River R. R. Co.*, 19 Barbour, 461, which was an action to recover damages for an injury done plaintiff by a collision, there was a verdict for \$6000, and a motion for a new trial, on the ground that the damages were excessive. The court after reviewing the evidence, and considering the question as to the power of courts to set aside verdicts for excess, said:

"I have already said that the verdict for half the amount would have been better adapted to the facts of the case, but I am not inclined to insist upon having the verdict so much reduced. I think the motion should be denied, if within twenty days the plaintiff shall stipulate to reduce the verdict to \$4000, and if such stipulation is not given, that a new trial be granted upon payment of costs."

In *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246, the action was for damages for the killing of a man, and the verdict was for \$10,000 damages. The Supreme Court considered the damages excessive, and refused to affirm the judgment unless the plaintiff would enter a remittitur for \$5000.

In *Thompson v. Butler*, 95 U. S. (5 Otto) 694, the action was for a breach of contract, but sounded in damages. The verdict was for \$5066.17, and before judgment plaintiff remitted \$66.17, and judgment was entered for \$5000. Defendant brought error, and plaintiff moved to dismiss because the matter in dispute did not exceed the sum or value of \$5000, and the Supreme Court sustained the motion, holding that the remittitur defeated its jurisdiction.

Mr. Sedgwick says: "Where the jury have given such excessive damages that the court feels bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and, on his remitting the excess, will deny the motion for a new trial, and this in actions of torts, as well as on contracts. Or the court may send the cause back to a second jury on the quantum of damages alone. But in Texas this power of reducing the verdict by the action of the courts has been limited to those cases where the measure of damages is matter of law, upon the ground that in other cases the court has no right to substitute its opinion for that of the jury." Sedgwick on Damages, 6th ed., p. 765.

*Cassine v. Delaney*, 38 N. Y. 178, is not in harmony with the

other New York cases cited above, but the rule as quoted from Mr. Sedgwick seems well sustained by adjudications.

See *Belknap v. Railroad*, 49 New Hampshire, 374; *Doyle v. Dixon*, 97 Mass. 208; *Lambert v. Craig*, 12 Pick. 199; *Blunt v. Little*, 3 Mason, 102; *Henry v. Watson*, 4 T. R. 659; *Black v. Carrolton R. R. Co.*, 10 Lous. Ann. 33; *Mortimore v. Thomas*, 23 Ib. 165; *Murray v. Hudson River R. R. Co.*, 47 Barbour, 196; *Yeager et al. v. Weaver*, 64 Penn. State, 425; *Kinsey v. Wallace*, 36 California, 462; *McIntyre v. New York Cent. R. R. Co.*, 37 N. Y. 287.

It is an old rule of practice, both in actions *ex contractu* and *ex delicto*, that where the damages awarded by the verdict exceed the sum laid in the *ad quod damnum*, the error may be corrected by remitting the excess. 2 Tidd's Prac. 896, 941; 1 Saunders' Plead. and Ev. 740.

But an offer to remit part of the excess only, will not cure the error. *Tyner v. Hays*, 37 Ark. 599.

[NOTE.—The abstract in this case is misleading. See the facts stated in the opinion.]

So, where rents and profits were awarded as damages in ejectment, when plaintiff was entitled to none in the particular case, this court permitted the error to be cured by remittitur. *Rector v. Gaines et al.*, 19 Ark. 70, 92; *Hunter v. Gaines et al.*, Ib. 93.

In this case, on the return of the verdict, plaintiffs voluntarily offered to remit \$1235 of the damages awarded by the jury. Why might not this be allowed by the court, as it was, to avoid the expense and trouble of a new trial? The court was not obliged to be content with the release of that sum. It might have required a larger sum to be remitted, if in its judgment the remaining damages were excessive. But the court was content with the amount released.

If we are to treat the verdict as if still standing for the sum returned by the jury, regardless of its abatement by the amount released, plaintiff could in no case cure an excess in a verdict for damages by remitting less than the whole sum awarded by the jury.

We come now to the question, were the unremitted damages for which judgment was rendered so excessive as to require this court to reverse the judgment and award a new trial?

On the former trial the verdict was for \$4500 damages, which, after deducting the sum then proved for medical bill and funeral expenses, \$260, left \$4240, as awarded for the mother's loss of the services of the child, which was equal to \$265 for each year, or \$22.08 for each month, or eighty-four cents and six mills for every work-day during the whole period of sixteen years from the death of the child to its majority, making no deduction for boarding, clothing, loss of time, expense of sickness, and assuming that the

child would have lived and served its mother until it was of age. On that trial the opinions of witnesses were taken as to what might have been the value of the services of the child to the mother had it not been killed. No objection was made at the trial to the introduction of such testimony, and none could have been made on appeal. This court, in the opinion rendered, stated what the witnesses said, but neither condemned nor approved the admission of such evidence. It was said, however, that the opinions of the witnesses were of no great value. Page 368.

The court further said (after settling the rule as to the measure of damages): "The mother was a widow, poor, and kept a boarding-house for a living. The son, her only child, was five years old when killed. He was intelligent, healthy and promising. If he had lived, and remained obedient to his mother until he was of age, his services would have increased in value as he advanced in years. If given no education he would have earned for her the wages of ordinary labor only. If sent to school, or apprenticed to fit him for skilled employment, expenses and loss of time would have followed.

"An impartial jury, of sound judgment and experience, properly instructed as to the measure of damages by the court, would consider all the facts, circumstances and contingencies in fixing a reasonable value upon the probable services lost to his mother by his death."

And the court finally said: "We are satisfied that if the facts of the case were submitted to one hundred impartial men, of sound, discriminating judgment, of experience and observation in the raising of children, properly instructed in the law as to the measure of damages, ninety-nine, if not all of them, would say that the damages awarded in this case for loss of probable services were excessive, and such is our judgment."

We have seen above what the result of the second trial was. The child was too young to render any valuable services to the mother at the time it was killed. No witnesses were examined as to what might have been the value of the probable services of the child to its mother during its minority, had it not been killed, and the learned counsel for appellant have not, in their brief, submitted that any should have been called and examined on that subject. As to the measure of damages, it is not complained that the jury were not correctly and fully instructed.

We noticed in the opinion of the former appeal in this case, that in some of the States, statutes limited the amount of damages to be recovered, where the death of a human being is the subject of an action. But our Constitution provides that "no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property," etc.

(Art. 5, Sec. 32.) The matter of damages is therefore left to juries and the courts.

Where an injury to personal or real property, which has a market value, is the subject of an action, the damages may be ascertained by aid of witnesses acquainted with such property.

So where the death of a person earning or capable of earning wages or doing service, is the subject of the action, what he was earning or capable of earning, at the time of his death, may be proved by witnesses, as the basis of forming a judgment of probable future earnings. But where the death of a child, incapable of earning anything, or rendering service of any value, at the time of its death, as in this case, is the subject of the action, the value of the probable future services to its parent, during its minority, must in the nature of things, be matter of conjecture.

The statute provides that "when the person killed or wounded be a minor, the father, if living, if not, the mother; if neither be living, then the guardian, may sue for and recover such damages as the court or jury trying the case may assess." Act of 3d of February, 1875, sec. 3; Acts of 1874-5, p. 133.

The amount of damages to be recovered is not limited by the statute, and could not be under the constitutional provision above cited. But a jury is not left without restraint in the matter of assessing damages for the death of a minor, or in any other case. If the damages assessed are so enormous as to shock the sense of justice, and to indicate that the verdict is the result of passion or prejudice, the trial judge may set it aside, and if he refuse, this court, on appeal or writ of error, may do so. It was in the exercise of this judicial power, that this court set aside the verdict on the former appeal, because in its judgment the damages awarded were excessive.

It may be well to notice some of the reported cases, under statutes similar to ours, in which damages were awarded for the killing of children. In *Oldfield v. New York & Harlem R. R. Co.*, 3 E. D. Smith, 103, the suit was brought for the benefit of the mother, for the killing of her child, a girl between six and seven years of age, and the jury awarded \$1300 as damages for loss of probable future services, and the court refused to set aside the verdict as excessive. There was no proof that the child was earning anything at the time she was killed. There was evidence that she was remarkably proficient in music. Judge Ingraham said: "I cannot suppose that the Legislature intended to confine the damages in such case to proof of actual pecuniary loss. Such a supposition would render the law nugatory. The statute was intended to give damages for prospective losses, and not for what could be proven; and to require proof of such loss would be merely to obtain the opinions of witnesses in such a question, instead of the opinion of a jury." The other judges concurred.

The judgment was affirmed by the Court of Appeals. See *Oldfield v. N. Y. & H. R. R. Co.*, 14 N. Y. Rep. 310.

In *Drew v. The Sixth Avenue R. R. Co.*, 26 N. Y. 49, the action was to recover for an injury to the plaintiff's son, a lad of about eight years old, who was injured by being run over by defendant's horse cars in one of the streets of the city, and resulted in a verdict and judgment for \$2500 damages. The plaintiff was a widow, and her son lived with and was supported by her; and on his part he performed slight services, such as going on errands, and assisting his mother in a store kept by her. No witnesses were examined as to value of probable future services. The court said the amount of the damages was a matter belonging to the jury, and affirmed the judgment.

In *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 287, the action was for the benefit of children whose mother had been killed. It was proved that she was under fifty years of age, in vigorous health, and accustomed to earn about a dollar a day by her labor as a seamstress, etc. The verdict was for \$3500 damages. A new trial was directed, unless plaintiff would accept a reduction of the verdict; this plaintiff consented to do, and judgment was entered for \$2387.57 damages. The Court of Appeals affirmed the judgment, and held that it was proper to prove what the mother usually earned before she was killed, and her capacity for personal care, intellectual culture, and moral training of her children.

In *Ihl v. The Forty Second Street R. R. Co.*, 47 N. Y. 317, the action was for the killing of a child three years old. At the close of the proof, defendant moved for a nonsuit because there was no evidence of any pecuniary injury resulting to the next of kin of the deceased child, from its death, etc. The motion was overruled, and the jury returned a verdict for \$1800 damages. The Court of Appeals affirmed the judgment. Justice Rappallo said: "The absence of proof of special pecuniary damages to the next of kin resulting from the death of the child, would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as matter of law, that there is no pecuniary damage in such a case, or that the expenses of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parent could

have derived from his service had he lived. These calculations are for the jury, and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion."

In *Pennsylvania R. R. Co. v. Banton*, 54 Penn. St. R. 495, the mother, a widow, sued for damages for the killing of her son, who was between thirteen and fourteen years of age. The mother was engaged in the sale of milk and cream, and her son was assisting her in the business when he was killed. The verdict was for \$1748 damages, and the Supreme Court affirmed the judgment.

In *Louisville & Nashville R. R. Co. v. Connor, Adm'x*, 9 Heiskell, 19, the child killed was eighteen months old, and the jury gave the mother \$3000 damages, and the Supreme Court affirmed the judgment, saying nothing as to the amount of damages awarded by the jury.

In *City of Chicago v. Major*, 18 Ill. 349, the death of a child four years old was the subject of the action, and the jury awarded \$800 damages, and on appeal the judgment was affirmed. As to the measure and proof of damages in such case, the court said:

"The plaintiff's damages could only be estimated for the pecuniary loss suffered by the death of the deceased, without taking into account the mental anguish or bereaved affections, and the jury must make their estimate of such pecuniary damage from the facts proved, and it was not necessary that any witness should have expressed an opinion of the amount of such pecuniary loss. In this, as in all other cases, it was proper for the jury to exercise their own judgment upon the facts in proof, which they are supposed to possess in common with the generality of mankind. It is only where witnesses are supposed to possess a skill and judgment superior to the generality of mankind, upon a particular subject, that their opinions are allowed to go to the jury, for the purpose of supplying the supposed want of experience and judgment of the jury. Where such aids are not attainable, or are not produced, then the jury must be guided by their own best judgment, and applied to the facts in proof, for the purpose of arriving at a conclusion."

In *City of Chicago v. Scholton*, 75 Ill. 469, the action was for the killing of a boy twelve years old. The court said:

"Where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss, for which compensation, under the statute, may be given. In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. No doubt the damages could be greatly enhanced by proof of the personal



character of the deceased. Evidence of mental and physical capacity to be of service to his father in his business, his habits of industry and sobriety, when the deceased is old enough to have established a character, are elements to be considered in assessing the pecuniary loss."

The jury awarded \$2833.33 damages. The Supreme Court reversed the judgment, because the trial judge, in charging the jury, had not clearly stated the rule as to the measure of damages, so as to restrict it to pecuniary loss.

In an article in Central Law Journal, Vol. 15, No. 15, p. 286, headed "The Value of Children," cases of enormous damages are reported, and one where \$5000 damages were awarded for killing a girl, a healthy, bright child of six years, and a new trial refused. But we do not attach much value to such precedents. It is shown in the same article that English juries have not set as high a value on the lives and limbs of children as the American juries have.

In this case the first jury awarded the mother \$4500 damages, and we set it aside for excess. The second jury gave \$3500 damages, and appellees voluntarily remitted \$1235 of the sum awarded, and the trial judge did not regard the remainder as excessive.

If the case was remanded for a third trial, it is not probable that another jury would give a less amount. There must be an end of litigation in the case.

Affirmed.

#### DISSENTING OPINION.

EAKIN, J.—In expressing my dissatisfaction with two points in the opinion rendered in this case, I fully concede that it is in accordance with the greater weight of American authorities. A dissent under such circumstances requires an apology. I hope to find it in my earnest conviction of the importance of the subject-matter, and of the duty which each State owes to itself, as new conditions arise in the progress of law, to mould and adapt its jurisprudence to those conditions, so far as may be in harmony with old-established principles.

I do not think, in the first place, that in actions sounding in damages, an excessive verdict should be cured by a remittitur, where there is nothing in the record, nor in the proof, to indicate with some tolerable certainty the limits of a correct verdict. To do so is, in effect, to substitute the private opinion of the judge for the judgment of the jury upon the facts, and deprives a defendant of the benefit of a fair trial by an impartial jury, because there has been an unfair one, which should be treated as a nullity. Besides, an excessive verdict indicates either a want of due comprehension of the law and facts, or passion, or prejudice on the part of the jury, and the verdict should be set aside in toto, even as to

the liability of defendant; not held good as to liability, and reformed as to amount, according to the judge's sense of the fitness of things. This does not seem in accordance with the object of our Constitution in providing that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." I cannot think a defendant has had this right, by a trial which has resulted in a vicious verdict, so as to be left afterwards to the discretion of the judge.

I cannot but suspect that the recent growth of this practice has sprung from the necessity which the courts have felt of some sword to cut the Gordian knot, in which they have become implicated, by endeavoring to reconcile the irreconcilable. That is, by holding, first, that in civil actions for death no damage can be recovered but such as are strictly compensatory in a pecuniary sense; and second, that there need be no proof whatever of such damages, beyond the facts of the killing, and the age, health and physical condition of the deceased, leaving the juries to assess damages according to their inner sense of the justice of the case. Under such circumstances it is not surprising, especially in suits against corporations, that plaintiffs sometimes distrust their good fortune in the extent of their success, and seek to make it surer for a less amount by remittitur; nor, on the other hand, is it unnatural that the courts should resort to some such patriarchal adjustment, to escape the difficulties of each particular case. But I think this disturbs the harmony of law and interferes with the right of trial by jury.

Next, I think there should be proof of damages.

Suits of the nature now in question were unknown to the common law. They originated in England under what is commonly known as Lord Campbell's Act, passed in 1846. (9 and 10 Vict. ch. 93), and which may be found in a note to Pierce on Railways, on p. 386. This act has served as a model for similar acts in many American States, amongst others, our own. The general purpose of the act was to provide, for the benefit of surviving relatives and dependents, a right of action for the death of a person, which did not exist at common law. It provides no measure of damages whatever. The language is that "in every such action, the jury may give such damages as they may think proportionate to the injury resulting from such death, to the parties respectively for whom, and for whose benefit, such action shall be brought."

Before that act, and at common law, there had been no difficulty in determining when special damages need not be proved, or when such proof was necessary to obtain more than such as were nominal; even after the liability to the action should be clear. The distinction is indicated in the old case of *Pleydel v. Earl of Dorchester*, 7 Term Rep. 529, and is this, that where they are given for personal injuries, or as punitive, and for such matters as can-

not be estimated on a pecuniary basis, such as pain, distress, humiliation, etc., there, pecuniary damages need not be proved, because such things cannot be estimated by a money standard. Verdicts are for consolation of the injured, and for examples to others in such cases. But where damages are regarded as property compensations for losses of property or values, they must be shown. And values, whether of property, services, time or expectations, were always provable as facts, not taken as opinions of experts. And this doctrine, outside of what may be called the Lord Campbell Act, prevails to this day.

Notwithstanding the generality and wide scope of the language of the act, the English courts, with a wise forecast, I think, of the danger to be apprehended from unrestrained juries, held, from the beginning, that the damages to be recovered should be strictly compensatory, for loss of the value, in a pecuniary sense, as near as it could be ascertained, of the life of the deceased to the beneficiary of the suit. That nothing could be recovered for solace, nor as an example, nor as compensation for distress of mind or heart. Nothing but cold value of lost aid, according to its nature, and in the market sense. It was recognized that such prospective values could not be exactly proved—that they could at best be only approximated. Hence the rule was adopted that the damages should be estimated by what should be shown to be a reasonable expectation of future pecuniary benefit. The earliest case I find is that of *Blake v. Midland Ry. Co.*, 18 Adolph. & El., N. S., p. 93. It overrules the instructions given the jury, at the assizes, where Parke, B., said, speaking of merely pecuniary compensation: "I cannot say to the jury that this is the only thing. I can only give them my notion of it, and they must settle it themselves." The notion he had given was that the measure should be only pecuniary loss. In the Queen's Bench it was held that he should not have left that to the jury, but have confined them to the strict pecuniary loss. This was followed, and the doctrine more distinctly settled, in the subsequent cases of *Franklin v. S. Eastern Ry. Co.*, 3 Hurst & Nor. 211, and *Duckworth v. Johnson*, 4 Ib. 653. It is now well established, as above stated, and has been universally followed, on this branch of the question, in America.

It would seem to follow, that the reasonable expectation of pecuniary benefit should be shown by some proof of the value of the services or aid to be expected, or that the common-law rule would apply, and the damages should be nominal. It is taken out of the class of cases where the damages may be assessed according to the feelings of the jury. In all the English cases to which I have turned, I find that there was some proof of the value of the services lost, or expectations disappointed, and the damages had been fixed by such proof. It is a notable fact that in England the verdicts under Lord Campbell's Act have been always very small.

In America it seems that the practice in some States has obtained of allowing verdicts for estimated damages, made by the jury on their own judgment and knowledge of affairs. The cases cited by the court are mostly in point, and the embarrassments which have resulted, has led to what I think an evil equally dangerous. I mean the practice of allowing remittiturs (which in some cases have even been suggested by the court), in order to mitigate the severity of damages. Thus, one disturbance of the harmony of the law compels another, and leads to confusion. I think it cannot be said that judges have judicial knowledge of the clear net value of children to their parents during minority, any more than of the value of services rendered by an employee in a suit upon a *quantum meruit*. The practice only shifts the responsibility from juries to judges, of estimating damages according to their own inner sense of right, and under it the cardinal principle, that damages should be measured by a pecuniary standard alone, drifts away and is lost.

I would not venture a dissent from an opinion supported by so many precedents of other States, were it not comparatively a new question in judicature, and that I feel the importance to each State of deciding for itself, independently of others, in fixing its jurisprudence for the future. I am supported, I think, by the ordinary practice in the courts, of proving or attempting to prove such values, as was done in this case upon the first trial. It seems to be an afterthought on the second trial to omit all such proof whatever. I think it is the universal practice in England to make such proof, as illustrated in the recent case of *Rowley v. London & N. W. Ry.*, Law Reports, 8 Exchequer, 221; s. c., English Reports, with Moak's Notes, vol. 6, p. 293. Mr. Pierce, in his work on Railroads, whilst laying down the rule as followed in this case, says, nevertheless (p. 395), that proof of actual pecuniary loss has been required to sustain a verdict for more than nominal damages, citing cases in Illinois and New York, which he construes. I think, too, that the views I have expressed are fully sustained by the Supreme Court of Pennsylvania, in the cases of *Penn. R. Co. v. Zebe et ux.*, 33 St. Rep. 318; *Same v. Adams*, 55 St. Rep. 499, and especially in *Same v. Keller*, 67 St. Rep. 300.

Our Constitution forbids the Legislature from passing any act "to limit the amount to be recovered for injuries to persons or property." If the courts cannot limit them by proof, where merely compensatory, and are not careful in supervising them in cases where they may be allowable for solace, or as exemplary, so as to see that they are not the result of passion or prejudice, then the condition of the corporations will become too precarious for the investment of capital. They are useful to the community, but with the utmost care they cannot avoid the negligence of employees. I doubt whether they could long withstand a succession of

verdicts reached by juries from their private estimates of justice, upon mere proof of negligence and death, without any proof of the pecuniary value of deceased to the surviving relative.

I do not think it impossible or very difficult to show approximately (and that is enough) the ordinary value of the services of minors at different ages, as now prevailing, and upon the supposition that they should live and existing values continue, together with the ordinary expense, *per contra*, of clothing, feeding, and educating them. Of course it cannot be done exactly, but the principle adopted as to the measure of damages, seems to require that it should be done as nearly and fairly as possible. It is not well to escape the difficulty by practical abnegation of the principle, and it amounts to that when juries are instructed that they can only find a verdict for compensation, without any proof before them to enable the court to determine whether or not they have paid any regard to the instructions. Juries are not remarkable for fidelity to abstract advice in conflict with their own views of right.

I think the verdict was excessive, and that the remittitur should not have been allowed to cure it; and that a new trial should be ordered. I would do this, not from any disrespect of the line of authorities my associates have followed, but because I think it most consonant with principle, in accordance with English practice, not unsupported by respectable American authority, and best in its results for the citizens of the State.

**Reducing Verdict for Tort by Remittitur.**—The great weight of authority is to the effect that in an action against a railroad company for a personal tort when the verdict is excessive, the court may put the party upon terms and require the filing of a remittitur or else reverse the judgment or set aside the verdict. *Rose v. Des Moines, etc.*, R. Co., 39 Iowa, 246; *McKinley v. Chicago, etc.*, R. Co., 44 Iowa, 314; *Kavanaugh v. Janesville*, 24 Wisc. 620; *Benagam v. Plassam*, 15 La. Ann. 703; *Nashville, etc.*, R. Co. v. *Smith*, 6 Heisk. (Tenn.) 174; *Boyd v. Brown*, 17 Pick. 461; *Diblin v. Murphy*, 3 Sandf. (N.Y.) 19; *Collins v. Albany & S. R. Co.*, 12 Barb. 492; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Thompson v. Butler*, 95 U. S. 694; *Belknap v. Boston & Me. R. R. Co.*, 49 N. H. 358; *Black v. Carrolton R. R. Co.*, 10 La. Ann. 33; *McIntyre v. New York Central R. R. Co.*, 37 N. Y. 287; *Marsh v. Union Pacific R. Co.*, 6 Am. & Eng. R. R. Cas. 357; *Miller v. Keokuk & Des Moines R. Co.*, 14 Am. & Eng. R. R. Cas. 293.

Some few authorities lay down a contrary doctrine. *Gale v. New York, etc.*, R. R. Co., 53 How. Pr. 391; dissenting opinion in *Collins v. Council Bluffs*, 35 Iowa, 432; dissenting opinion in *Rose v. Des Moines, etc.*, R. Co., 39 Iowa, 257; *Cassine v. Delany*, 38 N.Y. 178; *Nashville, Chatt. & St. L. R. Co. v. Foster*, 11 Am. & Eng. R. R. Cas. 180.

**Damages for Death of Minor Child.**—In addition to the cases cited in the opinion as to the measure of damages for the death of a minor child, our readers are referred to the following: *Chicago v. Hesing*, 83 Ill. 205; *Chicago, etc. R. Co. v. Becker*, 84 Ill. 483; *Caldwell v. Brown*, 53 Pa. St. 453; *Barley v. Chicago, etc.*, R. Co., 4 Biss. 430; *Kramer v. Waymark*, L. R. 1 Exch. 241; *St. Louis, Iron Mt. & S. R. Co. v. Freeman*, 4 Am. Eng. R. R. Cas. 608; *Lehigh Iron Co. v. Rupp*, 7 Am. & Eng. R. R. Cas. 25.

**Reasonable Expectation of Pecuniary Benefit.**—There must be a reasonable expectation of pecuniary benefit to the parents from the continuance of the child's life to entitle them to any damages for causing his death. *Franklin v. Southeastern R. Co.*, 3 H. & N. 211; *Walton v. Southeastern R. Co.*, 4 C. B. (N. S.) 296; *Heatherington v. Northeastern R. Co.*, L. R. 11 Q. B. D. 160; *Rain v. St. Louis, etc., R. Co.*, 71 Mo. 164; s. c., 5 Am. & Eng. R. R. Cas. 610.

**Evidence of Specific Pecuniary Damage not Essential.**—Evidence of specific or particular pecuniary damage is, however, not essential to recovery. The jury may infer such damage unless there are facts in the case which render such inference impossible. *Gorham v. New York Central R. Co.*, 23 Hun (N. Y.), 449; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310; *McGovern v. New York, etc., R. Co.*, 67 N. Y. 417; *Nagel v. Missouri Pac. R. Co.*, 10 Am. & Eng. R. R. Cas. 702.

But see *Pennsylvania Co. v. Lilly*, 73 Ind. 252; s. c., 4 Am. & Eng. R. R. Cas. 540.

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VIMONT

v.

CHICAGO AND N. W. RY. CO.

(*Advance Case, Iowa. April 8, 1885.*)

A party to whom a claim for damages for personal injuries caused by the negligence of a railroad company in Iowa has been assigned, may maintain an action thereon in the courts of this State, although such assignment was executed and delivered in another State, by the law of which it would be void.

APPEAL from Polk Circuit Court.

Plaintiff, as assignee of one Darby Carr, brings this suit to recover damages for a personal injury sustained by said Darby Carr while in defendant's employ as a laborer on a gravel train, and which was occasioned, as it is alleged, by the negligence of his co-employees. This appeal is from the order of the Circuit Court sustaining a demurrer to certain counts of defendant's answer.

N. M. Hubbard and Whiting S. Clark for appellant.

Nourse & Kauffman for appellee.

REED, J.—It is alleged in the third paragraph of the answer that the assignment by Carr to plaintiff of the claim on which the action is brought, was executed, delivered, and accepted by plaintiff, and its acceptance took place in the State of Illinois, and that by the common law, which is in force in that State, the assignment of said cause of action is void. The question raised by the demurrer to this paragraph is whether the plaintiff is precluded by these facts from recovering on the cause of action sued on. The



assignment under which plaintiff claims is set out in the petition, and it is of a cause of action which is alleged to have arisen under the laws of this State in favor of an employee of the defendant on account of a personal injury sustained by him in consequence of the negligence of a co-employee.

It may be conceded for the purposes of this case, we think, that a claim for damages arising out of a personal tort, and having its origin where the common law is in force, is not assignable before being reduced to judgment. The ground upon which it is held that such claim is not assignable is that it is a mere personal claim in favor of the injured party, and that it does not become part of his estate, or descend to his representatives, but terminates at his death; and consequently it has no value which can be so estimated as to form a consideration for a sale, and there is in it no element of property to make it the subject of a grant or assignment. See *Rice v. Stone*, 1 Allen, 566; *People v. Tioga Common Pleas*, 19 Wend. 73. The contract of assignment of such claim between parties otherwise competent to contract is void at common law, then, not because of any incapacity of the parties to enter into the contract, but because the claim itself is not the subject of contract. Under the statutes of Iowa, however, such claims are given a character entirely different from that sustained by them when arising under the common law. They are not merely personal claims in favor of the parties sustaining the injuries, and they do not terminate with their death, but become part of their estates and descend to their representatives, and actions thereon may be maintained by the representatives. Code, §§ 2525-2527; *Carson v. McFadden*, 10 Iowa, 91; *McKinley v. McGregor*, Id. 111; *Shafer v. Grimes*, 23 Iowa, 550. They are also assignable under the laws of this State. *Weire v. City of Davenport*, 11 Iowa, 49; *Gray v. McCallister*, 50 Iowa, 497.

If Carr, plaintiff's assignor, had a valid claim for damages on account of the alleged injury, such claim had the qualities of a property right or interest. It constituted a part of his estate, and was capable of being transferred within the State by assignment, and at his death it would have descended to his representatives, and his assignee or representative could have maintained an action in his own name for its enforcement. It seems to us that the mere carrying of this claim into another State could not have the effect to change its character or take from it any of its qualities, but that it would retain its properties notwithstanding the removal of the person in whose favor it arose to another State or county; and that as it had the properties which rendered it assignable imparted to it by the laws under which it arose, it would retain those properties when taken beyond the jurisdiction of those laws, and would be assignable anywhere.

The other questions raised by the demurrer are the same as

those determined in *Vimont v. Chicago & N. W. R. Co.*, 13 Am. & Eng. R. R. Cas. 176, and the ruling of the Circuit Court thereon is in accord with our holding in that case.

Affirmed.

ADAMS, J., dissenting.

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VIMONT

v.

CHICAGO AND N. W. RY. CO.

(*Advance Case, Iowa. October 21, 1884.*)

An action for a tort is assignable so as to vest in the assignee a right of action in his own name.

A party having a claim against a railroad company for personal injuries assigned the same to plaintiff. The latter undertook to pay from the proceeds the attorney's fee, and also to reimburse himself for his expenses in prosecuting the suit. He was also to retain a sum certain for his trouble. The balance he undertook to pay to the assignor. *Held*, that the railroad company defendant could not set up in defence that the assignment was void because tainted with champerty or maintenance.

In such an action, even if it should appear that the assignment was colorable and fraudulent, the assignor need not be made a party to the action.

Where an assignment of a cause of action is legal and valid, the fact that it was made for the express purpose of depriving defendant of the right to remove the case to a federal court on the ground of citizenship, will not invalidate it or entitle defendant to such removal.

APPEAL from Polk circuit court.

The plaintiff, as assignee of one Johnson, brought this action to recover damages for a tort committed by the defendant. The latter moved the court to require Johnson to be made a party to the action. This motion was overruled, and the defendant appeals. See 13 Am. & Eng. R. R. Cas. 176. The latter afterwards filed a motion to transfer the cause to the federal court. This motion was sustained, and the plaintiff appeals.

Nourse & Kauffman for plaintiff.

N. M. Hubbard and W. S. M. Clark for defendant.

SEEVERS, J.—As to the defendant's appeal. The petition states that C. O. Johnson was a passenger on one of the defendant's trains, and because of the negligence of the defendant he was injured and entitled to recover damages therefor. The nature and extent of the injuries are stated, and that Johnson had assigned his claim and right of action to the plaintiff, wherefor judgment was asked. The defendant pleaded—First, a general denial of the allegations of the petition; second, "that the assignment was color-

able, collusive, and fraudulent, and made for the purpose of depriving defendant of its right to remove the cause to the federal court;" and, third, "that the assignment of the claim by Johnson, together with the assignment executed at the same time by Vimont, constitutes barratry, champerty, and maintenance, and is void for that reason." The agreement executed by the plaintiff at the time the assignment was made is in these words:

"In consideration of the assignment to me by C. O. Johnson of his claim for damages against the Chicago & Northwestern Ry. Co., resulting to him by reason of an injury received by him on or about the thirty-first day of August, 1881, on said railway, I hereby agree to dispose of the entire amount realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advances of money I may make I am to retain thereof the sum of fifty dollars. I am also to retain all sums of money that I may advance in the prosecution of said claim. Next, I agree to pay out of the proceeds of said recovery the reasonable fee of the attorneys and agents employed to prosecute said claim, or such fee thereof as may be agreed upon, if an agreement for a specific amount shall be agreed upon. And the balance of said recovery I agree to pay to the said C. O. Johnson. Wm. H. Vimont."

The defendant also pleaded that the assignment was made and completed in Illinois, and that by the laws of that State the assignment is void, and that it is illegal and void under the laws of Iowa. The defendant moved the court to make an order requiring said Johnson to be made a party plaintiff, on the ground that no determination of the controversy could be made unless said Johnson was a party to the record. And, in support of the motion, the defendant introduced the deposition of the plaintiff showing the agreement taken back at the time of the assignment was as above set forth: "That the plaintiff paid said Johnson no money, and don't know him; that the assignment was procured by his attorneys, Nourse & Kauffman,—Mr. Nourse being his brother-in-law; that he had no knowledge of this claim prior to receiving information in regard to it from Nourse & Kauffman."

Is an action for a tort assignable so as to vest in the assignee a right of action in his own name? In *Weire v. City of Davenport*, 11 Iowa, 49, it was held that a right of action for a tort could be sold and transferred at common law, and in *Gray v. McCallister*, 50 Iowa, 497, it was held that a claim for a personal tort, which dies with the party, could be sold or transferred like any other cause of action. See also *Small v. Railroad Co.*, 55 Iowa, 582. We are not disposed to depart from the rule established in these cases, therefore the assignment in this case is valid under the law of this State. The laws of Illinois were not introduced in evidence

in this case and are not, therefore, before us. In the absence of proof to the contrary it must be presumed that the laws of that State are the same as those of Iowa. This we have held in several cases.

The assignment of the claim vested the legal title thereto in the plaintiff. Being such owner, he legally is the real party in interest, and the statute requires that the action for the recovery of such claim must be brought in the name of the said party. Code, § 2543. But it is urged that the assignment is colorable, and does not vest the right to maintain this action in the plaintiff, because of the agreement made at the time of the assignment whereby he agreed to pay a portion of the amount recovered and realized to Johnson, the assignor. If the assignment vested the legal title to the claim in the plaintiff it would seem that, ordinarily, he, as such owner, should have the right to do what he pleased with it. Besides this we understand this identical question was made and determined in *Knadler v. Sharp*, 36 Iowa, 232, adversely to the defendant, and no adequate reasons having been adduced why that case should be overruled we therefore follow it. We may further remark that it was held in *Small v. Railroad Co.*, before cited, that champerty and maintenance are not a defence to the action. We therefore are of the opinion the plaintiff can maintain this action.

It is said as it may be determined the assignment is colorable, fraudulent, and void, that a complete determination of this case cannot be made unless Johnson is made a party. Johnson filed a paper in response to the motion in which he disclaimed any interest in the prosecution of this action, and stated in substance that he did not own the claim, but that he had assigned it to the plaintiff. If it should be determined on the trial, that the defendant had not been negligent, such adjudication would be binding on Johnson, and the controversy would be finally ended; but, if the plaintiff should be defeated on the ground that he did not own the claim, or that the assignment was colorable and fraudulent, it may be that Johnson could maintain an action thereon. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy between the parties before the court cannot be made without the presence of other parties the court must order them to be brought in." Code, § 2551. The rights of others cannot be prejudiced by whatever determination is made between these parties. Those of Johnson certainly cannot be, but if they should, he would clearly be estopped from complaining. It is urged, however, that the defendant would be prejudiced if compelled to again litigate the questions involved with Johnson.

We do not think, conceding this to be so, that such prejudice would be of a legal character, for the reason that the statute does

not seem to so contemplate. In actions at law, if the controversy can be determined, without prejudice to the rights of others, between the parties to the action, this, ordinarily, is all that can be required. The motion, therefore, was properly overruled.

5. As to the plaintiff's appeal.—After the determination of the foregoing motion the defendant filed a petition for the removal of the action to the federal court. It is in the following words: "That the defendant is, and was at the date of the commencement of this suit, a citizen of the State of Illinois; that William H. Vimont, plaintiff herein, was also, at and ever since the commencement of this suit has been, a citizen of the State of Illinois; that C. O. Johnson is the real party plaintiff and is the party that received the injury, and that, for the sole purpose of avoiding the jurisdiction of the federal court, said Johnson made said pretended assignment of said claim to said William H. Vimont, and received back the written contract set out in defendant's answer; that said assignment and contract were made in Illinois, and that, by the laws of the State of Illinois, the assignment is invalid and insufficient for said William H. Vimont to maintain an action thereon in the State of Illinois; that the assignment and contract between said Vimont and said Johnson are barratrous and champertous, and against public policy and void, as appears by defendant's answer herein; that said C. O. Johnson is the real party in interest as plaintiff, and was, at and before the date of the commencement of this suit, and still is, a citizen of the State of Iowa, and prays that said C. O. Johnson be made a party plaintiff in this suit; that there is and was at the date of the commencement of this suit a controversy between petitioner and the said Johnson, the real plaintiff, and that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and that the present term of this court is the first term at which the case could be tried. . . . Petitioner offers a bond with surety and prays" the court to order the action to be removed, etc.

The act of Congress under which the removal is sought provides that where there is a controversy between the citizens of different States, and the amount in controversy exceeds \$500, exclusive of costs, the action may be removed from the State to the federal court. Does the record show that there is such a controversy? We have held that Johnson is not a necessary party, but that the plaintiff can maintain this action. It then follows, we think, that there is not, and cannot be in this action, any controversy except between the plaintiff and defendant, who are both residents of Illinois, and therefore, as between them, the right of removal does not exist. But counsel for the defendant claim that it appears from the record that the assignment of the claim by Johnson to the plaintiff was made for the express purpose of depriving the defendant of the right to remove the action to the federal court. The

petition for the removal so states. But the plaintiff, in what is designated as an answer thereto, denied that Johnson was the real plaintiff, and denied that the assignment was made for the purpose stated in the answer. But it is said that we can only look to the facts stated in the petition, and must disregard anything stated by the plaintiff. For the purpose of this case it will be conceded this is true, where the petition states merely the citizenship of the parties, and the amount in controversy,—that is to say, simply the jurisdictional facts; but where it goes beyond this, and states that some one not a party to the record is the real party, and thus alleges facts that have the effect to bar the right of the plaintiff to recover in any court, we think a different rule must prevail. We therefore cannot say that the record shows the plaintiff is not entitled to maintain this action; for that question is controverted, and the plaintiff is entitled to have it tried and determined in the ordinary manner.

But conceding that the object of the assignment was to deprive the defendant of the right to remove the action to the federal court, yet it had the effect to vest the legal title to the claim in the plaintiff. He legally owns and controls it, and if the action is tried on the merits, the judgment is conclusive against the world. There is no law which prohibits the assignment. Clearly, the act of Congress does not do so. It cannot, therefore, be a fraud on the rights of the defendant. At most, the defendant has been deprived of a right in a manner not prohibited by law. The assignment does not have the effect to cut off any defence the defendant may have. This case is clearly distinguishable from *Browne v. Strod*, 5 Cranch, 303, and *McNutt v. Bland*, 2 How. 10. It has been held that when trustees are personally qualified by citizenship to bring suit in the federal courts, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified. *Coal Co. v. Blatchford*, 11 Wall. 172; *Knapp v. Railroad Co.*, 20 Wall. 122. The converse of this proposition must be true. The results of the litigation belong to the parties beneficially interested. The trustees, in one sense, are mere conduits; but as they control the litigation, and are legally the owners of the cause of action, they are entitled to maintain the action.

We do not understand *Jones v. League*, 18 How. 76, conflicts with the foregoing views. In that case the question was whether there had been a change of citizenship, so that the federal courts had jurisdiction. The court said: "The change of citizenship, even for the purpose of bringing suit in the federal court, must be with the *bona fide* intention of becoming a citizen of the State to which the party removes." This case recognizes the right of a party to change his residence, although it may be done for the express purpose of affecting the jurisdiction of the federal courts. The motive or intent, therefore, of the change is immaterial. So,



in the present case, the fact that the assignment was made to deprive the federal court of jurisdiction is immaterial. The assignment was in fact made. It was authorized by law, and the assignment of a promissory note or any other chose in action may have precisely the same effect; that is, the legal effect of the assignment of a chose in action may deprive or give the federal courts jurisdiction, though not contemplated by the parties. It does not seem to us that it can make any difference if the assignment of the chose in action was made with the specific intent which would result from the act done by operation of law. In the concluding paragraph of the opinion in the case last cited it is said the conveyance or assignment in that case must be "*bona fide*, so that the prosecution of the suit shall not be" for the benefit of the assignor. No such question was before the court in that case, and we hardly think it was meant that where a party had legally divested himself of all title to the subject of the action, that the fact he might be interested in the result of the litigation would affect the jurisdiction of the courts; but rather that if the assignor has retained such interest in the cause of action as will enable him to control the litigation for his benefit, then the jurisdiction of the courts will be affected by reason of such fact.

On the defendant's appeal the judgment of the circuit court is affirmed, and on the plaintiff's appeal, reversed.

**Champerty and Maintenance.**—The defence of champerty or maintenance is not available to the defendant in an action. It is a matter with which he has no concern. *Robinson v. Beale*, 26 Ga. 17; *Small v. Chicago, R. I. & Pac. R. R. Co.*, 55 Iowa, 582. A full discussion of the decisions relative to champerty and maintenance will be found in the notes to *Atchison, T. & S. F. R. Co. v. Johnson*, 11 Am. & Eng. R. R. Cas. 1, and *Canty v. Lattermar*, 15 Am. & Eng. R. R. Cas. 380.

**Removal of Causes.**—This aspect of the above case has been fully considered in the note to the former report, 13 Am. & Eng. R. R. Cas. 176.

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## HAWES

v.

BURLINGTON, C. R. AND N. RY. CO.

(*Advance Case, Iowa. September 17, 1884.*)

Where the charge of the court, consisting of a statement of the issues and paragraphs numbered consecutively, is excepted to, at the time the charge is given, in the following words, "And to the giving of such instructions as given at the time the defendant duly excepted," such exceptions are sufficiently specific.

In an action to recover damages for an injury caused by negligence of defendant, although defendant pleads that such injury was caused by the neg-

ligence of the plaintiff, it is error to instruct the jury that the burden of proof is on defendant to prove such issue.

Where a release pleaded as an affirmative defence is admitted by plaintiff, but he pleads matter which, if true, avoids it, it is error to instruct the jury that the burden of proof is on defendant.

In such an action, where it appears that the plaintiff was a minor, and that he executed a release of his claim for damages in consideration of \$40 paid him by defendant, and that he did not have the money so paid in his possession or under his control, an instruction to the jury that plaintiff could not recover if he had it under his control, does not require the plaintiff to make the tender unless he has under his control the identical money received by him, and is not erroneous.

APPEAL from Linn district court.

It is stated in the petition that the plaintiff is a minor, and was in the employ of the defendant as a brakeman on a freight train, and that, without negligence on his part, when endeavoring to couple certain cars, because of defendant's negligence his hand was caught and injured. The ground of the negligence stated in the petition is that the cars were violently and forcibly thrown together. Trial by jury, judgment for the plaintiff, and defendant appeals.

J. & S. K. Tracy for appellant. J. B. Young for appellee.

SEEVERS, J.—The charge of the court, in addition to a statement of the issues, consists of paragraphs numbered from one to sixteen, inclusive, and, from an amended abstract, it appears that exception thereto was taken, at the time the charge was given, in the following words: "And to the giving of such instructions as given, at the time the defendant duly excepted." This we understand to mean that each paragraph of the charge was excepted to, and, as this was done at the time, no stated reasons were required. Code, § 2787. But counsel for the appellee insists that such a general exception presents no question for the consideration of this court unless the whole charge is erroneous, and this is not claimed. In support of this proposition, *Davenport Gaslight Co. v. City of Davenport*, 13 Iowa, 229, is cited. In that case there were 15 instructions asked and refused, "to which the defendant excepted." This was held to be a sufficient exception. The charge of court covered ten pages, and at the conclusion thereof it was stated, "to the giving of which instructions the defendant excepted," and it was held that this exception was not sufficiently specific. There is not, therefore, any difference between the cited case and this, unless there has been a change in the statute. We are bound by the ruling made in that case. It was decided when the Revision was in force, and while it does not distinctly appear that the charge of the court consisted of paragraphs numbered consecutively, it is fair to so presume, because section 3058 of the Revision provided it should be so numbered; and as this provision has been incorporated

into the Code it cannot be said there is any difference in the statute in this respect. Code, § 2788.

Section 3059 of the Revision provided as follows: "Every part or paragraph of the charge shall be deemed approved, unless excepted to before the retiring of the jury. If so excepted to, that fact, and by whom excepted to, whether plaintiff or defendant, shall be stated by the court on the margin, against such instructions or part of the charge."

The opinion in the cited case is mainly based on this section. It was thought the statute recognized a distinction "between instructions asked and refused and the charge of the court." The section above quoted has been omitted from the Code, and it is provided therein: "If the giving or refusal [of instructions] be excepted to, the same may be without any stated reason therefor, and all instructions demanded must be filed and shall become a part of the record." Code, § 2787. In so far as exceptions to instructions are concerned, if taken at the time, it will be observed there is not now any difference between those asked and the charge of the court. If each paragraph of the charge is excepted to, it is sufficient. In *Mann. v. S. C. & P. R. Co.*, 46 Iowa, 637, it was held that an exception was sufficient which was expressed in these words: "And to the giving by the court of said instructions, Nos. 2 to 15, inclusive, and to the giving of each, the defendant excepted." See, also, *Sherwood v. Snow*, 46 Iowa, 481. The exceptions under our present statute are sufficiently specific.

The defendant pleaded—First, a general denial; second, contributory negligence of the plaintiff; and, third, a release of the damages sustained. To the latter the plaintiff replied that the release had been obtained by fraud. In stating the issues the court said to the jury that the defendant had so pleaded, and instructed as follows: "You are instructed, as to all the material allegations of the petition, the burden of proof is on the plaintiff, and before you are warranted in returning a verdict in his favor in any amount, he must satisfy you, by a preponderance of evidence, of the truth of such allegations. But as to material affirmative allegations and defence of the answer, the burden of proof devolves upon the defendant, and they must be established by a preponderance of the evidence." No instruction other than this was given, in relation to which party had the burden to establish there was or was not contributory negligence. The defendant unnecessarily pleaded that the plaintiff was guilty of contributory negligence, yet it was pleaded as an affirmative defence, and, under the issues as stated by the court, the jury must have understood, we think, that the burden was on the defendant to establish such issue. In this there is error. The rule on this subject, in this State, is so well understood, and has been so repeatedly declared, that it is not deemed necessary to cite the decisions in which it has been so held. The release

was plead as an affirmative defence, and the jury were instructed that the burden to establish it was on the defendant, although the execution of the written release had not been denied, and the plaintiff pleaded matter which, if true, avoided it. In this respect, also, the instruction is erroneous. It is true that in another instruction the jury were informed that as to the release they must find for the defendant, unless the plaintiff had established it had been procured by fraud. We are not prepared to say this cured the error. The most that can be said is, the instructions are contradictory, and it is impossible to tell which the jury followed. *Hoben v. B. & M. R. R. Co.*, 20 Iowa, 562; *State v. Hartzell*, 58 Iowa, 520.

There was evidence tending to show that the plaintiff was a minor, and that he executed the release in consideration of \$40 paid him by the defendant, and that he did not have the money so paid in his possession or under his control. The court, in substance, instructed the jury that the plaintiff could not recover unless he tendered to the defendant such money, if he had it under his control. This instruction, it is said, does not require the plaintiff to make the tender unless he had under his control the identical money received by him, and we think this is so. It is provided by statute that a minor is bound by his contracts unless he disaffirms the contract "and restores to the other party all money or property received by him by virtue of his contract, and remaining within his control at any time after he has attained his majority." Code, § 2238.

The contention of the appellant is that the words "remaining under his control" should be construed as referring alone to property; the argument being that money is the representation of the value of all property, but that the same amount of money is and must be the equivalent of the money received by the plaintiff, and therefore it is not necessary that the plaintiff should have under his control and tender the particular coin or bill which he had received. The argument concedes that the identical property must be tendered; and in *Jenkins v. Jenkins*, 12 Iowa, 195, it is said: "It is not shown or pretended that he had remaining under his control, at any time after attaining his majority, any money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore." We are unable to say whether it was money or property which was received in that case. It is assumed it was one or the other, and it is clearly held that it makes no difference which; and, under the statute, it is difficult to say that one rule applies when money is received, and a different rule when property is received. No such distinction is made by statute. We therefore cannot make one by construction where there is not the slightest ambiguity in the statute. Besides this, we are bound by the case above cited.

There was evidence tending to show that after the accident

the plaintiff said that he alone was to blame, and the court instructed the jury as follows: "The verbal admissions of parties are to be received with caution; and if you believe from the evidence that certain verbal admissions alleged to have been made by plaintiff immediately after the accident were made, and that he was at the time of making the same agitated and nervous, and suffering great pain, this rule of law is particularly applicable to the verbal admissions so made. The memory of witnesses may be defective; certain words may be added or omitted with no wrong intent on the part of witnesses, which admission or omission may give a wholly different meaning than what was contained in the words actually used." This instruction is objected to because it contains no direction as to what the rule would be if the admission was deliberately made and understood at the time. Under the evidence the jury might have so concluded, and the defendant was entitled to an instruction as to the effect of such a finding.

The second instruction is said to be erroneous because it assumes certain facts have been established. In this we do not concur.

Reversed.

**Release.**—As to attacking the validity of a release for damages, see *Chicago, R. I. & P. R. Co. v. Lewis*, and note, *infra*.

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## CHICAGO, ROCK ISLAND AND PACIFIC RY. Co.

v.

LEWIS.

(109 *Illinois Reports*, 120.)

An affirmance of the judgment of the circuit court, in an action to recover damages on account of negligence, by the Appellate Court, implies a finding of the facts the same as they were found by the trial court, and no further inquiry can be had in respect to them, the statute being peremptory that in such cases no assignment of error shall be allowed in this court which calls in question the determination of the inferior or Appellate Court upon controverted questions of fact.

Asking an instruction to withdraw a case from the jury, or directing them to find for the defendant, in its effect is treated the same as a demurrer to the evidence, which admits everything the evidence tends to prove. Where there is evidence tending to show a right of recovery in the plaintiff, it is error to instruct the jury to find for the defendant, although the court may believe the weight of the evidence is with the defendant.

Where the facts of the case are undisputed or admitted, it becomes a question of law for the court to decide whether such admitted facts constitute a legal cause of action; but where the facts are disputed, and the evidence in respect to them is conflicting, such is not the case, and it is not for the court to find the facts, and from them say whether the law is for one party or the other.

A release of all claim for damages growing out of a personal injury caused by negligence on the part of defendant, if fairly obtained by the agents of defendant (a railway company), and understandingly executed by the plaintiff, is an effectual bar to an action to recover for such injury.

If a party, however, after receiving a serious personal injury as a passenger on a railway train, through negligence of the company, is induced to sign a release of all damages by the agents of the company, through their representations or acts, which induce in his mind the belief he is only signing a receipt for money paid him at the time for loss of time and expenses incident to the delay resulting from the accident, and not as a discharge of the company for the injuries sustained, or if such release is procured by fraud and circumvention, it will be void as to the party so induced to execute the same. Fraud vitiates everything it touches, and a party will not be allowed to avail of an undue advantage obtained over another by fraudulent practices.

Or, if a person, while under the influence of opiates to such an extent as to be incapacitated to contract, is induced to execute a release of damages for a personal injury, it will not be obligatory upon him, and will be no defence to an action brought by him.

Where a person was severely injured as a passenger on cars of a railway company, and in a few hours after being taken to a hotel, after the injury, was induced by the agents of the company to sign a release of his right of action, under the belief he was signing only a receipt for money, which belief was caused by their fraudulent practices and representations, and it appeared that at the time he was suffering great physical pain and laboring under the effect of opiates, it was *held*, that under the circumstances he was not chargeable with such negligence in executing the release without having first read the same, as to preclude him from asserting the truth as to the manner in which his signature was procured.

If a release of a cause of action is obtained from a person by fraud and circumvention, at a time when he is incapable of making a contract rationally, and money is paid to him at the time of its execution, he may repudiate the release, and bring his action without first paying or tendering back the money received by him.

An instrument absolutely void need not be rescinded in order to remove it out of the way to the assertion of a right. A contract void on account of fraud, or for any other reason, is in law as though it had never been executed.

The court should not give an instruction where there is no evidence tending to support the hypothetical case assumed by it, for the reason that it directs the attention of the jury to elements of liability that do not exist under the evidence, and it is manifest error to do so.

It is not necessary the court should be satisfied that the hypothetical case stated in an instruction is fully sustained by the testimony, before it would be required to submit it to the jury. Even positive testimony is not always required. It is sufficient if the assumed fact may be reasonably inferred from the circumstances proved.

APPEAL from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Peoria County.

Thomas F. Withrow and H. W. Wells for the appellant.  
Barrere & Grant for the appellee.

Scott, J.—It cannot consistently be contended in this court, as was  
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done in the lower courts, the evidence is not sufficient to sustain the verdict as to the alleged negligence of defendant in respect to the accident that caused the injury to plaintiff, nor that the evidence was not sufficient to warrant the jury in disregarding the alleged release of damages offered in evidence by defendant, as having been obtained through improper practices. These are questions of fact about which the evidence is conflicting, and as to which the jury found the issues against the position taken by the defendant. The affirmance of the judgment of the Appellate Court implies a finding of the facts in the same way, and no further inquiry will be had in respect to them. In cases like the one at bar this court is required to re-examine cases brought to it by appeal or on writ of error, as to questions of law only, and the statute is peremptory, no assignment of error shall be allowed which will call in question the determination of the inferior or Appellate Court upon controverted questions of fact.

Before passing to the consideration of the questions of law thought to arise on the record, it might be well first to ascertain the issues made by the pleadings that were submitted to the jury. The declaration charges defendant with negligence in regard to keeping its road-bed or track in a suitable and safe condition, as the cause of the accident that resulted in injury to plaintiff. The issues formed were, first, upon the plea of not guilty; and second, upon a special plea averring full payment and satisfaction, and discharge of all causes of action. Under these issues it was the duty of the jury to find, from the evidence, first, whether defendant had been guilty of negligence in regard to its track; and second, whether the release in evidence was so fairly obtained as to bar a recovery. On these issues the cause was tried in the circuit court. If it shall appear the evidence touching these questions of fact was conflicting, and no error of law occurred at the trial, it is plain the judgment must be affirmed, whether this court, on an original consideration of the evidence, would come to the same conclusion as did the trial and appellate courts, or not.

It is conceded the trial court should not give an instruction to the jury where there is no evidence on which to base it,—or, what is the same thing, where there is no evidence which tends to support the hypothetical case assumed by the instruction. It is for the reason it directs the attention of the jury to elements of liability that do not exist under the evidence, and it is manifest error to do so. This is the settled law, and has been so often declared by repeated decisions of this court it is not necessary to cite authorities in its support.

It may be also stated, it is the practice in this court to examine the entire evidence, with a view to ascertain whether or not instructions were properly given or refused by the trial court, and this duty is never omitted where the discussion makes it necessary

to do so. That has been done in this case with the utmost care.

As respects the negligence of defendant in regard to the condition of its track, which produced the accident, it is so much a question of fact no argument is made in this court on that branch of the case. It is as to the defence attempted to be made under the special plea, upon which a most elaborate argument has been made in this court. It is not denied plaintiff signed the paper in evidence, purporting to release defendant from all causes of action, for the consideration stated. Of course, if it was fairly obtained by the agents of defendant, and understandingly executed by plaintiff, it would constitute an effectual bar to the action. In respect to the alleged release, the manner in which it was obtained, and the condition of plaintiff, mentally and physically, at the time she signed it, the record contains a great deal of testimony, and much of it is irreconcilably conflicting. The accident to the train on which plaintiff was a passenger occurred about eight o'clock in the evening before the day on which the alleged release was signed. It was most probably signed between one and two o'clock in the afternoon of the next day after the accident. The injury to plaintiff was very severe, and the sequel will show it will be permanent. Her shoulder blade was fractured, and the muscles in that part of her body were very much injured. Since then she has not had the use of her left arm. Evidently the shock to her nervous system was very great. She suffered intense pain as soon as the sense of feeling returned after the accident. It appears she was placed in a car that had not left the track, and continued on her journey, and reached Keokuk at about eight o'clock the next morning after the accident, and was then taken to a hotel. She lived in this State, and was anxious to get home. During the night after the accident, whiskey and morphine were administered to her on the cars, but in what quantities the proof does not show with any certainty. It may be fairly assumed, from the evidence, the doses given were of the size usually administered to adult persons. On account of sickness, induced by pain, plaintiff slept none during the night, notwithstanding the opiates she had taken. She was still suffering great pain when she reached the hotel at Keokuk. Shortly after arriving at the hotel she was visited by a division superintendent of defendants' road. It is probable, from the evidence, he visited her twice that forenoon. Perhaps the last visit was near twelve o'clock. It was at the last visit it is said he negotiated a settlement with her, in pursuance of which the alleged release was afterwards obtained. The replication to the plea of accord and satisfaction puts in issue the fairness of obtaining from plaintiff the release insisted upon so confidently as a bar to the action. On this branch of the case the court was asked by defendant to instruct the jury "there is no sufficient evidence in this case

to warrant inference of fraud, and the court instructs the jury to find a verdict for defendant." The refusal of the court to so instruct is complained of as error. Without entering upon any analysis of the evidence, it is sufficient to say it was of that character the court would not have been justified in withdrawing the case from the jury, or, what is the same thing, instructing the jury to find for defendant. It would have been plainly error in the court to have so instructed. Asking an instruction to withdraw a case from the jury is, in effect, the equivalent to a demurrer to the evidence. A demurrer to evidence is understood to admit everything it tends to prove. Applying that principle to this case, and admitting all the testimony tends to prove, this court has no hesitation in saying it is not a case that ought to have been taken from the jury, or where the jury should have been instructed to find for defendant.

The assignment of errors in this court raises broader and more comprehensive questions. First, under the law, properly applied to the facts, the judgment in the circuit court should have been reversed; and second, the facts disclosed in the record show that plaintiff in the court below had no legal cause of action. As the argument is understood, it is insisted these are questions of law, and are open for consideration in this court. On the facts, as counsel insist the record discloses them to be, an argument is made they show plaintiff had no cause of action in law, and for that reason it is said the judgment should now be reversed by this court as for an error in law in affirming the judgment by the Appellate Court. Were the facts of this case uncontroverted, or stood admitted, the writer of this opinion would most freely admit it would then be a question of law, open for consideration in this court, whether the admitted facts constituted a legal cause of action. But that is not the case here. On every phase of the case the evidence is conflicting, and touching the manner of obtaining the alleged release it is irreconcilably so. For instance, two witnesses (one an employee of defendant, and the other totally disinterested) state most positively the alleged release was read to plaintiff before she signed it, while two witnesses (one the plaintiff, and the other wholly disinterested) state with equal positiveness the release was neither read nor explained, as it was in fact written, to plaintiff before she signed it. All of these witnesses had the same means of knowing the facts concerning which they testified, as all of them were in the same room during the entire time,—a brief period of a few moments,—and all were giving special attention to what was being done. Whether the alleged release was fairly obtained, was a material fact, and concerning its execution the testimony of one or the other set of witnesses would seem to be untrue. It would hardly seem there could be any room for a misapprehension. Counsel do not appear to consider the jury have found the facts to

be different from what they understand the record to disclose them to be, and that an affirmance of the judgment implies a finding of the facts in the same way the trial court did. That being so, no further discussion can be had concerning them. But what did the trial court find? First, under the plea of not guilty, the jury must have found defendant was guilty of negligence in regard to that which produced the accident by which plaintiff was injured. The evidence tends to establish that fact, and it was material to a recovery. Second, under the special plea, it must have been found defendant did not pay plaintiff a sum of money in satisfaction and discharge of the cause of action, for that was the extent of the replication on which issue was taken to the country; otherwise the verdict would have been for defendant. No error has been assigned in this court calling in question the correctness of these findings as to the facts. The error assigned is, that on the facts as they are disclosed by the record, they show plaintiff has no cause of action. How is it to be determined what facts the record discloses? It is certainly not to be ascertained by this court, where the evidence is conflicting. Cases brought to this court on appeal or writ of error are to be re-examined on questions of law, only. Assuming, as must be done, the facts are as the trial and appellate courts have found them to be, it must be conceded, under the law, they show a legal cause of action in favor of plaintiff.

Passing now to consider the objections taken to the instructions given for plaintiff, it will be seen the fourth and fifth of the series, although couched in different phraseology, in fact assert the same principle, and may be considered together. It is stated as a matter of law, if the release was obtained from plaintiff by representations or acts of defendant's agents which induced in her mind the belief it was only a receipt for money paid her at the time as compensation to her for loss of time and expenses incident to the delay that had resulted from the accident, and not as a discharge of defendant from any claim she might have against the company for injuries sustained, or if it was obtained by fraud and circumvention on the part of the agents of defendant, the writing would be void as to her. So far as these charges assert a proposition of law, no definite objection is pointed out to either of them, nor is any perceived. Fraud vitiates everything it touches, and if the alleged release was obtained by fraudulent practices on the part of the agents of defendant, it need hardly be said it would not be obligatory on the party signing it, and certainly if she was induced to sign it under the belief, created by defendant's agents, she was simply signing a receipt for expenses, defendant would not be permitted to plead it as a defence to the action. That would be to have an advantage from its own wrong, which the law will not tolerate. A principle closely analogous to that embodied in the fourth instruction given, was declared to be the law in *Eagle Packet Co. v. Defries*, 94 Ill. 599.

And in the case of *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183, in considering a release in terms quite broad enough to cover the action, it was said, if the plaintiff was induced to sign it by representations it would cover merely his claim for a month's wages, or if he signed it under such belief induced by the words or acts of the agents of defendant, then the release would not be a bar to the suit. Other cases might be cited, but these are sufficient to show the propositions of law embodied in these charges are stated with sufficient accuracy.

The seventh instruction, of which complaint is made, contains two distinct propositions, and will be considered separately. First, if obtained from plaintiff while under the influence of opiates or liquor taken to alleviate pain, and she was incapacitated to contract, then the release was no defence to the action; and second, it was not necessary for plaintiff to pay back, or offer to do so, the money received at the time of signing the alleged release, as a condition precedent to her right to bring suit for damages. As respects the first proposition contained in this charge, some criticism is made on it hardly warranted by a natural and correct reading. It means, simply, that if plaintiff was under the influence of opiates to that extent she was incapacitated to contract, then the paper executed by her would not be obligatory, and understood in that sense, as any one would most naturally read it, obviously it is the law. It is in entire harmony with the doctrine of *Bates v. Ball*, 72 Ill. 108, the correctness of which is not questioned.

With regard to the second proposition, it may be safely stated as undeniable law, if the release was obtained by fraud, at a time when plaintiff was incapacitated to contract, it was absolutely void from the beginning as between the parties, and will stand in the way of the assertion of no right by the party defrauded. On principle, an instrument absolutely void needs not to be rescinded to remove it out of the way of the assertion of a right. It is for the obvious reason it never had any binding force, and there was therefore nothing to rescind. A contract void on account of fraud, or for any other reason, is, in law, as though it had never been executed. The case of *Mueller v. Old Colony R. R. Co.*, 127 Mass. 86, has many features in common with the one being considered, and is an authority in point.

But the position taken with most seeming confidence is, there is no evidence that would warrant the giving of either of these instructions, and the insistence is, as they submit matters to the jury not sufficiently proven, it was error to give them. The argument made on this branch of the case rests on a mistaken view of the evidence. It is not entirely accurate to say there is no evidence on which to base the instructions, nor that there is not sufficient to warrant the giving of them. Whether the conclusions of this court, if it were considering the case with



a view to determine the facts, would accord with the conclusions reached by the trial jury and the Appellate Court, is a matter of no consequence. The evidence in this record has been subjected to a careful consideration, and it is seen there is evidence tending, in some degree at least, to sustain every proposition submitted to the jury by the instructions. With the weight and credibility of this testimony this court has no concern. The determination of such questions is committed by law to other tribunals. It is sufficient if there is evidence on which to base the charges given to the jury.

Concerning the issue made by the replication to the plea of release, that no sum of money was paid in "satisfaction and discharge" of the causes of action mentioned in the declaration, the evidence is ample to justify the giving of the fourth and fifth instructions. Even the testimony of the superintendent alone, if the record contained no other, would be sufficient. There is testimony, and some of it quite satisfactory, that tends to show plaintiff was induced to believe the money was paid to her for expenses that she would incur in consequence of the accident, and not as a release of damages for the injuries sustained. It may have been under that belief she signed the alleged release. No negligence, under the circumstances, can be imputed to her on account of a failure to read the paper before signing it. She was in her private room at the hotel, suffering at the time the most intense pain, was partly disrobed, and was being attended by a lady,—a casual acquaintance,—who had been applying liniment to her person, and was then combing her hair, when two strange men entered the room to secure her signature to the paper. The interview lasted only a few moments. Evidence given is to the effect she was told by one of the men it was a receipt he wished her to sign for the money the superintendent had sent to her. There is also testimony that tends to show the paper was not read to her by the man that brought it to her for her signature. It is a matter of no consequence, so far as the decision of the case in this court is concerned, the record contains evidence flatly contradictory to that just stated. Involved, as the facts are, in conflicting testimony, but situated as it is conceded plaintiff was, it could hardly be expected she would read the paper as a careful business man would or ought to do before signing it. The omission, under the circumstances, to read the paper signed by her is certainly not such negligence as ought to bar her from asserting the truth as to the manner in which it was obtained from her. Situated as she was, she might well be excused from reading a paper she was about to sign, which, she says, she was told was a receipt for the sum of *twenty* dollars, for expenses. Conceding the fact to be well found, as must be done, that plaintiff was induced, by the acts of the agents of defendant, to sign the paper, under the belief it was a mere receipt for



expenses, then that would be a fraud upon her, and the alleged release would constitute no bar to the present action.

On the other clause of the instruction, concerning the incapacity of plaintiff to contract, it must be conceded the testimony is not as full as it is upon other branches of the case, but still there is enough to justify the court in submitting that phase of the case to the jury, as was done by the seventh charge. It is to be remembered the accident occurred about eight o'clock in the evening. Afterwards plaintiff was placed in another car, and continued on her journey through the entire night, and arrived at Keokuk the next morning about nine o'clock. During the night whiskey and morphine were administered to her at frequent intervals. Neither the number of doses nor the exact quantity of each that was given to her is known with any certainty. The testimony of the physicians examined is not satisfactory or harmonious as to the effect the medicines would produce, or as to how long the effect would continue. Indeed, they all concur that could not well be determined unless the quantity given was definitely known. It is certain the shock to the nervous system of plaintiff was very great, and that, with the effect of the medicines, might have had some effect on her mental condition. It was while she was in that condition,—mentally and physically,—within a few hours after her arrival at the hotel in Keokuk, after a night of most intense suffering, that had certainly not passed off, that she was approached in her private room by defendant's division superintendent, as he says, to procure a settlement of any cause of action or claim she might have against the company. This, it must be admitted, was unseemly haste, and whether plaintiff was "incapacitated to contract," it may be safely said she was in no condition to consider, with any degree of deliberation, a matter so grave as that submitted to her.

But another view may be taken. It is not necessary the court should be satisfied the hypothetical case stated in an instruction is fully sustained by the testimony before it would be required to submit it to the jury. That would practically include the services of a jury, and would debar a party of the constitutional right to have his cause tried by a jury. The court might take one view of the evidence, and yet, if submitted, a jury might reach a different conclusion, and it is for that reason a party has the right to have submitted any hypothetical case the testimony tends to sustain, otherwise the court might try the cause without the intervention of a jury in the first instance. But that, of course, could not be done over objection taken. Even positive testimony is not always required. It has been held by this court, in cases where there was no direct evidence of a material fact, that circumstances proven from which the fact might reasonably be inferred, would be sufficient on which to base an instruction. It was so ruled in Chi-

cago, Burlington & Quincy R. R. Co. v. Gregory, 58 Ill. 272, and also in Missouri Furnace Co. v. Abend, 107 Ill. 44.

After a most careful consideration, no error is perceived in the record of sufficient gravity to warrant a reversal of the judgment, and it must be affirmed.

Judgment affirmed.

**Release of Damages for Personal Injuries obtained by Fraud.**—Whether or not a release of liability for damages inflicted through the fault of a railroad company has been obtained through fraud and is therefore void is a question for the jury. Illinois Central R. R. Co. v. Welch, 52 Ill. 188; Schultz v. Chicago & N. W. R. Co., 44 Wisc. 688; Bussian v. Milwaukee, L. S. & W. R. Co., 10 Am. & Eng. R. R. Cas. 716; Kansas City & Olathe R. R. Co. v. Hicks, 14 Am. & Eng. R. R. Cas. 100.

There must be clear and indubitable evidence of fraud to warrant the submission of the question to the jury. Pennsylvania R. R. Co. v. Shay, 82 Pa. St. 198.

**Releases obtained during illness.**—But releases procured during the illness produced by the injury in question are looked upon with peculiar suspicion. Chicago, R. I. & P. R. Co. v. Doyle, 18 Kans. 58; Eagle Packet Co. v. Defries, 94 Ill. 598; Bussian v. Milwaukee, L. S. & W. R. Co., 10 Am. & Eng. R. R. Cas. 716; Chicago & W. D. R. Co. v. Mills, 11 Am. & Eng. R. R. Cas. 128.

**Releases without Assent of Counsel.**—And particular suspicion is cast upon releases obtained after suit brought without the consent or knowledge of the plaintiff's counsel. Bussian v. Milwaukee, L. S. & W. R. Co., 10 Am. & Eng. R. R. Cas. 716. But see Atchison, T. & S. F. R. Co. v. Johnson, 11 Am. & Eng. R. R. Cas. 1.

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## WESTERN AND ATLANTIC R. R. Co.

v.

## CITY OF ATLANTA.

(*Advances Case, Georgia. March 30, 1885.*)

When a municipality is obliged to respond in damages to a person injured by a defect in a public street, which defect is at a point where the street is used as the right of way of a railroad and is caused by the negligent conduct of the agents of the railroad company, who are bound to keep the street in repair, the municipality has a right to recover from the railroad company the amount paid out by it.

When in such case the municipality has given notice to the railroad company to appear and defend but it has failed to do so, the judgment obtained against the municipality is conclusive as to the right of the injured party to recover from the municipality and as to the amount which the municipality is entitled to recover from the railroad company.

In case of a suit of the municipality against the railroad company to recover damages in such case, the judgment against the municipality and the notice given by it to the railroad company may be offered in evidence.

A railroad company using a public street of a city as its right of way is bound to repair street crossings.

APPEAL from Fulton County.

Montgomery sued the city of Atlanta for an injury caused by defective highway, averring that certain steps on Foundry Street sidewalk were not in proper condition. The city of Atlanta plead that Montgomery "was not injured on a public street of the city, as alleged, but he was injured on the right of way of the Western & Atlantic R. R." About one week before that case was tried, and one day before the case was set down for trial, the city of Atlanta, through its attorney, served a notice on the railroad company, by serving its attorney, the purpose being, as stated in the notice, "to give it an opportunity to appear and defend said case, as the city would hold it liable over for any verdict or judgment that Montgomery might obtain against the city."

The railroad company disregarded the notice, and did not in any way appear or defend. The record shows that it was admitted by counsel for the plaintiff that the defendant did not come in and defend in the suit of Montgomery v. City of Atlanta, but declined to do so."

Montgomery obtained a verdict against the city for six hundred dollars and costs, which was paid by the city.

The city of Atlanta then brought suit against the Western & Atlantic R. R. Co. to recover back the money so paid, together with interests and costs. On the trial, the record in the Montgomery case was tendered in evidence, and also the notice to the railroad company to come in and defend. These were admitted under objection.

Julius L. Brown and W. D. Ellis for plaintiff in error.

W. T. Newnan and E. A. Angier for defendant.

STEWART, J.—A municipal corporation, having the care and control of the streets, is bound to see that they are kept safe for the passage of persons and property. If this duty be neglected, and one should be injured on account of such neglect, the corporation will be liable for the damage thus sustained.

If the injury should occur in a street, and on account of defects in the same, and if the street, at the point where the injury occurred, was used as a right of way of a railroad company, in such case the municipal corporation would have a remedy against the railroad company for the amount which it had been compelled to pay, provided it be shown that the injury resulted from the negligent conduct of the agents of the company. In such case, the company would be allowed to show that it was under no obligation to keep the street in safe condition where the injury occurred, or that it was not the fault of the company that the accident happened, or

that both the agents of the railroad company and the municipal corporation were at fault.

A judgment obtained against a municipal corporation for injuries received on account of defects in a street caused by a third person, would, in a suit by such corporation, brought to recover what it had been compelled to pay, be conclusive as to the right of the injured party to recover and as to the amount which the municipal corporation would be entitled to recover, notice having been given to such third person of the pendency of the suit, and that he should appear and defend.

The record of the suit between the injured party and the municipal corporation in such a case was admissible in evidence, as was also the notice given by the city to the railroad company of the pendency of the suit, and requesting the company to appear and defend. 2 Black (U. S.), 418; 4 Wall. 657.

In such a case, there was no error in giving in charge §§ 706, 707 of the Code. The reason of those sections applies more strongly to the necessity for keeping in repair street crossings in cities and towns.

The charge of the court was in substantial accord with the principles stated above, except that the jury might have been led to believe that the record of the case of the injured party against the city was conclusive against the railroad company for all purposes; while it should have been restricted, and the jury should have been informed for what purposes and to what extent the judgment against the city was conclusive, and as to the nature of the defenses which the company could set up against the former judgment.

Judgment reversed.

**Municipality held Liable for Defect in Street may Sue Party through whose Fault Defect Occurred.**—When a municipality is held liable in damages for a personal injury occasioned by a defect or obstruction in a street which has been caused by a third person, it has a remedy over against such third person. *Chicago v. Robbins*, 2 Black, 418; *Robbins v. Chicago*, 4 Wall. 657; *Lowell v. Short*, 4 Cush. 275; *Milford v. Holbrook*, 9 Allen, 17; *Boston v. Worthington*, 10 Gray, 496; *Woburn v. Henshaw*, 101 Mass. 193; *West Boylston v. Mason*, 102 Mass. 341; *Westfield v. Mayo*, 122 Mass. 100; *Norwich v. Breed*, 30 Conn. 855; *Littleton v. Richardson*, 34 N. H. 179; *Rochester v. Montgomery*, 72 N. Y. 65; *Portland v. Richardson*, 54 Me. 46; *First Nat. Bank v. Village of Port Jervis*, 96 N. Y. 550; s. c., 6 Am. & Eng. Corp. Cas. 233.

**Cases in which Railroad Company held Liable.**—In the following cases the principles above laid down have been applied as in the principal case where obstructions or defects in public streets have been caused by the fault of a railroad company. *Lowell v. Boston & Lowell R. Corp.*, 23 Pick. 24; *Woburn v. Boston & Lowell R. Corp.*, 109 Mass. 283; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *District of Columbia v. Baltimore & Potomac R. Co.*, 4 Am. & Eng. R. R. Cas. 179.

**Conclusiveness of Judgment.**—When notice has been given by the municipality to the party actually in fault to come in and defend and he fails to

do so, the judgment is conclusive upon him as to the liability of the municipality and the extent of such liability. *Portland v. Richardson*, 54 Me. 46; *Boston v. Worthington*, 10 Gray, 496; *Milford v. Holbrook*, 9 Allen, 17; *Westfield v. Mayo*, 122 Mass. 100; *Rochester v. Montgomery*, 72 N. Y. 65; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *District of Columbia v. Baltimore & Potomac R. Co.*, 4 Am. & Eng. R. R. Cas. 179; *First Nat. Bank v. Village of Port Jervis*, 96 N. Y. 550; s. c., 6 Am. & Eng. Corp. Cas. 233.

**Damages.**—The damages recoverable by the municipality comprise the judgment with interest and also all costs and expenses incurred, including a reasonable counsel-fee. *Westfield v. Mayo*, 122 Mass. 100; *Veazie v. Penobscot R. Co.*, 49 Me. 119; *Ottumwa v. Parks*, 48 Iowa, 119.

## OMAHA AND REPUBLICAN VALLEY R. R. Co.

v.

MARTIN.

(14 *Nebraska Reports*, 295.)

A railroad company is entitled to the exclusive use of its grounds, except at lawful crossings of public and private ways. It is not bound to guard against accidents at the crossing of an old, abandoned way which was never legally laid out.

ERROR to the district court for Lancaster County, where, upon a trial before Pound, J., the defendant in error had recovered a judgment for \$3500 on account of injuries received in the manner stated in the opinion.

A. J. Poppleton and J. M. Thurston, for plaintiff in error, cited: 1 *Thompson on Negligence*, 361; *Blyth v. Topham*, Cro. Jac. 158; *Bush v. Brainard*, 1 Cowen, 78; *Howland v. Vincent*, 10 Metc. 373; *Houmel v. Smyth*, 7 C. B. (new series) 781; *Binks v. Railroad Co.*, Best & S. 244; *Hardcastle v. Railroad Co.*, 4 Hurl & N. 67; *Vale v. Bliss*, 50 Barb. 358; *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Gramlich v. Wurst*, 86 Pa. St. 74.

Lamb, Billingsley & Lambertson for defendant in error.

The road was a legal highway by force of sec. 2477 Rev. Stat. U. S. *Flint v. Gordon*, 41 Mich. 428. Railroads are liable for excavating into any travelled way or thoroughfare unless the same is protected and guarded. Gen. Stat., § 101, p. 193. A railroad company that cuts into a highway or thoroughfare, where people are constantly passing and have been accustomed to pass and re-pass for years, is bound to either warn the traveller, divert the road, or guard the excavation, whether said highway be legal or not. The maxim, *sic utere tuo ut alienum non lædas*, applies with full force. *Potter v. Bumell*, 20 Ohio St. 151; *Vesey v. Railway Co.*, 49 Me. 119; *Wharton on Negligence*, § 819; *Thompson on*

Negligence, §§ 343, 344; *Atlanta R. R. v. Wood*, 48 Ga, 568; *Judson v. R. R.*, 29 Conn. 438; *Com. v. R. R.*, 27 Penn. St. 339.

**LAKE, Ch. J.**—A consideration of the character of the excavation into which the defendant in error fell and received his injury, and of the road along which he was travelling at the time, will effectually dispose of the case; and to these matters we shall confine most that we have to say.

The petition charges in substance, as cause of complaint, that the railroad company had dug and left unguarded "a deep, wide, and dangerous ditch and excavation," across a "public road and highway," which was "usually travelled by the public, . . . between Raymond and Valparaiso, in Lancaster County, into which the defendant in error drove his heavily loaded wagon, which was thus upset, and the injury complained of caused. It appears that the ditch or excavation was made during the fall of 1879, and the injury occurred in March, 1880.

The evidence shows that this excavation was made within the right of way of the railroad company, in grading its track, which appears to have been done in all respects in the usual manner of such work. Indeed, there is an entire want of evidence tending to show anything unusual in the work, or distinguishable from the ordinary methods of railroad grades in similar localities. There was nothing, therefore, in the characters of the excavation, or in the act of making it, which can render the company liable to the charge of wrong-doing, or of which any one can rightly complain. Within its right of way a railroad company doubtless has the right to make such ditches and excavations as may be necessary or proper in constructing its road, due regard being had for the rights of others. And this leads us to the inquiry of whether there was any want of such regard in leaving the excavation "open, exposed, and unguarded."

It is shown conclusively that where Martin was travelling when he was injured, was not along a legal highway. It had neither been laid out, nor in any way recognized by the county authorities as such. It was merely a permissive way, consisting in some places of one, and in others of several tracks, adopted by travel, and used for several years before the construction of the railroad. For quite a distance these tracks ran almost parallel with the railroad, which, near where the accident occurred, actually cut into and across them, so that travel had been forced to go further westward upon the prairie, where there was ample room, until the public road was reached a short distance above. In the darkness of the night Martin had the misfortune to follow one of these abandoned tracks, which at this point had not been used for several months, and thus ran his wagon upon the railroad right of way,



and into the excavation. It is conceded that the railroad company had erected no guard or barrier to prevent persons from driving upon its right of way, or from falling into these excavations, and that it had made no crossing for teams where the railroad cut through these old tracks. Do these omissions render the company guilty of negligence in its duty to the public, and liable to Martin for his loss? No case has been cited by counsel which would support us in so holding, and we are of opinion that they do not.

As before suggested, the company, in doing what it did, was in the lawful use of its own property. A railroad company is entitled to the exclusive use of its grounds, "except at lawful crossings of public and private ways." *Pierce on Railroads*, 402. Where the accident happened there was neither a public nor private way. It is true that after the grading for the railroad, in October and November, 1879, by which the course of travel was necessarily interrupted and changed, it had to some extent continued to follow alongside of, and near or upon the company's right of way, although a convenient public road had been laid out and opened to travel in the vicinity. But for this continuation of travel along and upon its right of way, the railroad company was nowise responsible. Not only had it done nothing to invite it to go there, but it had done all that the law required of it in the matter of providing suitable crossings at all public roadways passing over its track. Actionable negligence is said to involve the breach of a legal duty. *Pierce on Railroads*, 310. Here, as we have shown, there was no breach of legal duty, for the company was in the legitimate use of its own property, and was under no obligations to care for the safety of those who voluntarily or negligently went upon its right of way at the place where the accident to the defendant in error happened. 1 *Thompson on Negligence*, 361; *Bush v. Brainard*, 1 *Cowen*, 78; *Howland v. Vincent*, 10 *Met.* 371; *Clary v. The Burlington & Missouri R. R. Co.*, 14 *Neb.* 232.

In *Pittsburg, etc., R. W. Co. v. Bingham, Admr.*, 29 *Ohio St.* 364, it is said of the principle governing this case, that it "recognizes the right of the owner of real property to the exclusive use and enjoyment of the same, without liability to others for injuries occasioned by its unsafe condition where the person receiving the injury was not in or near the place of danger by lawful right, and where such owner assumed no responsibility for his safety by inviting him there without giving him notice of the existence or imminence of the peril to be avoided. In such cases the maxim, *sic utere tuo ut alienum non laedas*, is in no sense infringed. Where no right has been invaded, although one may have injured another, no liability has been incurred." We think this rule, so clearly expressed, is entirely applicable to the facts of this case, and that under it none of the acts of the railroad company, either of commission or of omission, amounts to actionable negligence.

In making the excavation, which was several feet within its right of way, no right of the public, or of Martin, was in the least degree trenched upon, for there that of the company was exclusive.

On a careful examination of the evidence, we are of the opinion that it makes no case for a recovery of damages. The judgment must be reversed and a new trial awarded.

Reversed and remanded.

**Crossings of Highways not regularly Laid Out or Opened.**—In order to hold the railroad company strictly to all the duties imposed upon it as to the management of its trains upon approaching a highway crossing, it is only necessary that the highway should be in ordinary public use. It need not have been duly dedicated or located by law. *Well v. Portland, etc., R. Co.*, 57 Me. 117; *Sweeny v. Old Colony & Newport R. Co.*, 10 Allen, (Mass.), 368; *Pittsburgh, etc., R. Co. v. Dunn*, 56 Pa. St. 280; *Delany v. Milwaukee, etc., R. Co.*, 33 Wisc. 67; *Philadelphia & B. R. Co. v. Troutman*, 6 Am. & Eng. R. R. Cas. 117; *International & St. N. R. Co. v. Jordan*, 10 Am. & Eng. R. R. Cas. 301; *Barry v. New York Central & H. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 615.

But until the highway has actually been opened to the public, there is no such duty. *Cordell v. New York Central & H. R. R. Co.*, 64 N. Y. 585.

In some cases the statutory duties of the railroad company at crossings is not held to exist in the case of roads opened after the construction of the railroad track until they are duly established as a public road under the law. *International & St. N. R. Co. v. Jordan*, 10 Am. & Eng. R. R. Cas. 301.

**Duty of Company as to Crossing Private Ways.**—The general rule is that railroad companies need not give a signal on approaching the crossing of a private right of way. *Johnson's Admr. v. Louisville & N. R. Co.*, 13 Am. & Eng. R. R. Cas. 623. But if the train is approaching at a high rate of speed, it is a question for the jury whether the company is not in such case bound to give a signal. *Thomas v. Delaware, etc., R. R. Co.*, 8 Fed. Rep. 728. Railroad companies must fence the track at the crossing of a private right of way. *Indianapolis, etc., R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, etc., R. R. Co. v. Thomas*, 11 Am. & Eng. R. R. Cas. 491. But not if such private ways are laid out in accordance with statutory provisions. *Indianapolis, etc., R. R. Co. v. Lowe*, 29 Ind. 545. As to the care required on the part of the company in passing a private right of way, see *O'Connor v. Boston & L. R. Corp.*, 135 Mass. 352; s. c., 15 Am. & Eng. R. R. Cas. 362.

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## PEARCE

v.

GRAND TRUNK RY. CO.

(10 *Ontario Appeal Reports*, 191.)

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three fifths of a mile off, but was not continued; and that

deceased was not guilty of contributory negligence. *Held*, that the case had been fairly submitted to the jury, and that the court would not disturb the verdict.

THIS was an appeal by the defendants from a judgment of the Common Pleas Division, discharging a rule *nisi* to set aside a verdict entered for the plaintiff, the administratrix of the late William Peart, who was accidentally killed while attempting to cross the railway of the defendants, near the village of Cainsville in the county of Brant, by a locomotive then under the management of the servants of the company. The circumstances under which the accident happened are fully stated in the judgments of the Court below, and on the present appeal.

On discharging the rule nisi, the following judgments were given by the Divisional Court.

GALT, J.—This was an action tried before Burton, J. A., at Brantford, brought by the plaintiff to recover damages for the death of her husband, who was killed on the track of the defendants on the evening of the 3d of April. At the conclusion of the evidence and the charge, the learned judge submitted several questions to the jury, which, with the answers, are as follows:

1st. Were the Railway Company or their servants guilty of negligence in not ringing the bell as required by law before reaching the crossing where the accident happened? Answer—Yes.

2d. Did they sound the whistle before reaching this crossing, and if so, at what distance from this crossing was it first sounded? Answer—Sounded the whistle before reaching the first or Lossing crossing.

It may be remarked that this crossing is at a distance of about three fifths of a mile from the crossing where the accident happened, that is to say, more than twice the distance required by law.

3d. If the whistle was in your opinion sounded and the bell rung at all, did the company's servants so sound the whistle or ring the bell continuously or at short intervals until the engine crossed the road where the accident happened? Answer—No.

4th. Did the injury to deceased occur in consequence of any neglect of the company? If so, what was the neglect or omission which in your opinion caused the injury? Answer—Yes.

5th. At what rate of speed was the engine going? Answer—Unusually fast.

6th. Could the deceased, if he had used ordinary diligence, have seen the engine in time to avoid a collision? Answer—No.

7th. Was the deceased, in your opinion, guilty of any want of ordinary care and diligence which contributed to the accident; if so, state in what respect? Answer—No.

The jury then rendered a verdict for plaintiff. At the last

Michaelmas sittings, Bethune, Q.C., gave notice of motion, and also obtained a rule *nisi* calling on the plaintiff to show cause why the verdict of the jury should not be set aside and a judgment entered for defendants, or a nonsuit entered, on the ground that the said verdict is against law and evidence, and on the ground of contributory negligence on the part of the deceased in attempting to cross the railway track in the face of the approaching locomotive.

This rule was argued by Bethune, Q.C., for defendant, and cause shown by Van Norman, Q.C., for plaintiff.

The jury have in this case found every issue for plaintiff. In *Tyson v. The Grand Trunk Ry. Co.*, 20 U. C. R. 256, which was an action brought for the same neglect of duty as that now complained of, the late Sir John Robinson, C.J., in giving judgment says: "The neglect complained of was that defendants' servants omitted to ring a bell or sound a whistle until within twenty-four or twenty-five rods of the crossing, instead of giving the signal at the distance of eighty rods, as the law requires. The plaintiff's complaint of omission in this respect was abundantly supported by evidence. On the other hand, the defendants' conductor in charge of the train, the engine driver and the baggage-man, all swore positively that the whistle was sounded before the train got within eighty rods of the crossing. The evidence was so contradictory that the jury had to determine on which side the evidence preponderated. We think we cannot find fault with their verdict. We certainly cannot feel satisfied that it was wrong. The evidence was of that character that a verdict given either way ought to settle that question of fact. We mean as to whether the proper signals were given in time."

The foregoing judgment is in accordance with the evidence and the findings in the case now before us. There could not be a stronger case than the present, unless we were prepared to hold that no verdict can be upheld when contradicted by the testimony of the engine driver and the fireman. Two of the witnesses for the plaintiff were young girls who were standing by the track when the engine passed, and were some two hundred yards from where the accident happened, and one of whom actually saw the collision, and they both swear positively that no bell was rung or whistle sounded. Their evidence is supported by a great number of other witnesses. So far, then, as the rule complains that the verdict is against evidence, it must be discharged. The learned counsel for the defendants, both at the trial and on the argument before us, contended strongly that the deceased had been guilty of contributory negligence in attempting to cross the track without looking for the engine, and that therefore the plaintiff could not recover. We have read the learned judge's charge, and think that he called the attention of the jury particularly to this

question, and that no objection can be taken to it, and the jury in answer to his question, specially directed to it, have found that the deceased was not guilty of contributory negligence.

The deceased was on his way home on the evening in question, driving along a road which runs in the same direction as the railway, and crosses it at such an angle as would not necessitate the driver turning his head. The horse, according to the evidence of one of the defendants' witnesses, was a good, gentle free horse after it was broken; he was a little stubborn; when he was broken he got over that.

We had occasion to review all the cases bearing on this subject in the case of *Miller v. The Grand Trunk Ry. Co.*, 25 C. P. 389, so it is unnecessary to do more than refer to that as showing what we consider the law to be as respects what is the duty of persons in crossing railway tracks. In the case now before us, it appears that the injury was not occasioned by one of the regular trains, but by a locomotive which was being driven to Fort Erie. There was therefore no reason for the deceased to expect a train to be passing at that hour, and there was a greater responsibility on the part of the servants of the defendants to ring the bell or sound the whistle, neither of which was done. The train was also being driven at a high rate of speed; the deceased in crossing the track would from the direction of the road drive straight on; there was no necessity for his looking either to the right or left, and as the train was going in the same direction there was no warning whatever given to the unfortunate man. Unless we were to hold that it is imperative on a man to stop before he attempts to cross a railway we cannot find fault with the finding of the jury in this case.

To quote again from the language of Sir John Robinson, in *Tyson's Case*: "These cases of collision on railways are among the most unsatisfactory that juries have to deal with from the difficulty of getting at the real facts. On the one hand, when the signals have been properly given, it seems generally possible to find persons who, having been either in or near the train, are ready to give evidence that they heard no bell or whistle, and this may well have happened from their not thinking of it at that moment and so not noticing the signals. And, on the other hand, there is, we must say, too much reason to fear that neglect to give the signals at the proper time and to continue them as they proceed to the crossing is a matter of very common occurrence; so much so as to make it incumbent on railway companies, for their own sakes, to be most earnest with their servants upon that point."

OSLER, J.—The jury might have found for the defendants, and such a finding would not have been disturbed, but as they have taken the more favorable view of the plaintiff's case after hearing all the evidence, I cannot say that the evidence so strongly prepon-

derates in the defendants' favor as to justify the Court in setting aside the verdict.

On the question of contributory negligence the case was sent to the jury with a direction that could not be complained of, nor looking at all the circumstances would I venture to say that they did not come to the right conclusion.

So long as the Company content themselves with relying upon servants who may be careless or forgetful, instead of employing such means as science may suggest, e.g., by automatic bells, etc., for giving the warning prescribed by law, they may expect to find juries taking that view of the evidence which is most unfavorable to them, nor am I prepared to say that as a rule juries have been wrong in doing so.

WILSON, C.J., concurred.

Bethune, Q.C., for the appellants.

VanNorman, Q.C., for the respondent.

HAGARTY, C. J. O.—A careful examination of the evidence in this case brings me to the conclusion that there is no ground for the interference of this Court.

Numerous cases have been before our Courts involving the same disputed questions, as to whether or no the signals prescribed by law were given by the railway trains.

I must say that I do not just now remember one in which the absence of such signals was sworn to with more distinctness than in the case before us. The evidence of the driver and fireman was express in favor of the defendants.

The testimony of such witnesses for the plaintiff as Dickinson, Everett, Dick, Ilite, and especially T. Stuart, was certainly more satisfactory than the statements we often hear as to witnesses not noticing the using of the signals. Several others corroborated the evidence of these witnesses named.

It is difficult to read the whole of the testimony without feeling that the finding of the jury on this branch of the case was probably right. The learned Judge who tried the case is not dissatisfied with the finding, having had the advantage of seeing all the witnesses. The defendants certainly cannot complain of his charge, which very fully and fairly presented for their consideration all the evidence and arguments of the defendants in support of their contention, first, that they were guilty of no negligence, and, secondly, as to the alleged contributory negligence of the deceased.

I think it would have been impossible to uphold a nonsuit in such a case.

Mr. Bethune, at the close of plaintiff's case, did not feel justified in asking for it, but when the evidence on both sides had been heard, he urged that there was no case to go to a jury to show the signals were not given—no evidence that could prevail against the



positive evidence on the part of defendants: 2, that deceased was guilty of contributory negligence.

Both these questions were for the jury, and were very fairly left to them.

I do not see how we can say that they were not properly answered.

Great stress was laid in the argument on the late case of *Davey v. London & Southwestern Ry. Co.*, just reported in 11 Q. B. D. 213, where the majority of the Court, Lord Coleridge, and Denman, JJ. (Manisty, J., not assenting), held that the nonsuit entered at the trial was right on the ground that the undisputed facts of the case showed there was no negligence on the part of defendants, and that the plaintiff's own want of caution was the sole cause of the accident.

The plaintiff sued for injuries sustained at a level crossing. He stated that before crossing he looked to the right along the down line, but he admitted he did not look to the left along the up line, and that if he had looked he must have seen the train coming.

The Court held there was no duty imposed on the defendants which was shown to have been neglected, and that the plaintiff was the sole cause of the accident to himself.

In appeal, 12 Q. B. D. 70, Brett, M. R., and Bowen, L. J., upheld the decision (Baggallay, L. J., dissenting). They considered that the plaintiff "did give evidence, though not strong evidence, of negligence of the defendants, which the jury would have been justified in saying was in part at least the cause of the accident" (p. 71).

But the plaintiff had admitted that if he had looked to the left up the line he must have seen the train coming therefrom; and the Master of the Rolls said, p. 72: "It seems to me impossible for any reasonable person to say otherwise than that he ought not to have crossed then. . . . The plaintiff himself showed, by uncontradicted evidence, that he had omitted to do what any reasonable man would have done, and had therefore been guilty of negligence."

The judgment of Baggallay, L. J., and his reference to *Slattery v. Dublin & Wicklow Ry. Co.*, 3 App. Cas. 1155, are well worthy of consideration.

If this case stands unchallenged it will probably revive the controversy which lasted so long, as to the respective functions of Judge and jury.

We have seen a note of a case, *Wright v. Midland Ry. Co.*, L. Times, 12th July, 1884, p. 195, which will increase the materials for discussion.

But giving the fullest effect to Davey's case, it cannot govern the case before us. We have no such evidence as the plaintiff there gave against himself. It is mere conjecture in our case

whether the deceased did or did not look up or down the line, or whether he heard or did not hear, or tried to hear the ordinary signals that he had a right to expect. It was a fair argument on defendants' part that the jury should infer from the evidence that he did not look or he did not listen to hear signals. But it was wholly a matter for the jury. They have absolved him from all charges of contributory negligence, and we cannot say any more than that their decision ought not to be interfered with.

PATTERSON, J. A.—If the law laid down in *Davey v. London & Southwestern Ry. Co.*, 12 Q. B. D. 70, went the length, to which I do not understand it to go, of casting on a plaintiff who sues for an injury caused by the negligence of the defendant the burden of affirmatively proving that he took all precautions to avoid the accident, or in other words of negating contributory negligence, as a part of his case, it would not necessarily govern us in this country.

In England there is no such statutory provision as that of our law which requires a warning to be given when approaching a level crossing, by ringing the bell or sounding the whistle. If that precaution is neglected, there is no escape for the railway company from the imputation of negligence. If no warning is given, and a person crossing the track is struck by the train, there is evidence enough in the proof of those facts to convince a jury, if nothing else is shown, that the accident was caused by the neglect to give the warning. To hold that the plaintiff must show affirmatively that he looked up and down the track or took other precautions which might have averted the danger arising from the defendants' negligence, would be to practically relieve the company and its servants from the duty cast upon them by the statute.

It may happen that in proving the cause of action, the plaintiff having necessarily to show where he was and what he was doing when the accident happened, may prove such negligence on his own part that the Judge may be compelled to say that, on the evidence given, a jury of reasonable men cannot say that the accident is shown to have been due to the defendants' negligence.

That was the position in *Davey's* case. The plaintiff himself admitted his own negligence in going incautiously and without looking for the train upon a crossing, when the law made no provision for his receiving any warning of the approach of the train, and when his attention had been given to looking one way, though he neglected to look the other.

Some of the language of the Master of the Rolls in 12 Q. B. D. at p. 71, seems calculated to convey the idea that the plaintiff must negative contributory negligence as part of his case, but I do not understand him or any of the other learned Judges to go to that length. He said: "It is for the plaintiff to show that the accident

which happened to him was caused by a negligent act of the defendants, or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident; because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff was also guilty of negligence which contributed to the accident, so that the accident was a result of the joint negligence of the plaintiff and the defendants, then the plaintiff cannot recover; it being understood that if the defendants' servants could, by reasonable care, have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

This passage is more favorable, as it is worded, than any other that can be selected from the judgments, to the present contention of the defendants.

I do not understand it, when read in connection with other parts of the judgments, and having regard to the character of the evidence to which the remarks were addressed, to be intended to assert more than that, the issue being on the plaintiff, it is for him to give evidence from which it can be reasonably inferred that the accident was caused by the negligence of the defendants, not merely that the defendants were negligent. But taking it to have a wider meaning, I think the concluding portion of it shows that under our law it would be much more difficult to nonsuit than in England. I am supposing a case of neglect to ring the bell and sound the whistle, and we may suppose the foot-passenger to walk on the crossing without looking up or down the line, his thoughts being preoccupied, as in what is called a brown study. Conceding that this would be negligence of the passenger, could it be said that an engine driver used reasonable care to avoid the accident to which the passenger's want of care exposed him, if he neglected to do what the law prescribed, and what, if done, might have roused the passenger to a sense of his danger? If it could be so held, it must be by the jury and not by the Judge.

I am not satisfied that a case occurring here with facts precisely like those in Davey's case could properly have been withdrawn from the jury. I think the statutory duty would prevent it. But the facts before us are materially different, as we have no admission, but only evidence, the credibility and value of which must be pronounced upon by the jury and not by the Judge.

I agree that we must dismiss the appeal.

CAMERON, C. J.—I am unable to distinguish this case in principle from that of Davey v. The London and Southwestern Ry. Co., 11 Q. B. D. 213, affirmed in appeal, 12 Q. B. D. 70. In giv-

ing judgment in the Divisional Court, Lord Coleridge, C.J., laid it down as a clear rule of law that in actions of this kind the plaintiff is bound to establish two things: first, that defendant did or omitted to do something which a reasonably careful person would not have done or omitted to do; and secondly, that the plaintiff's injury was thereby occasioned. I think for the purpose of this appeal it must be taken, though the evidence does not satisfy my mind, that the defendants omitted to perform the duty required of them by law to ring a bell or sound a whistle eighty rods from the crossing where the deceased was killed, and continue to sound the same at short intervals till the crossing was passed. So the plaintiff made out the first thing required of her to entitle her to succeed. It is on the second point that I think she fails, namely, to establish that the omission to perform the statutory obligation caused the death of deceased, which it seems clear to me, in fact, resulted from the deceased's own want of prudence in attempting to cross the track without before doing so looking to see if a train was approaching, or if he looked and saw, recklessly taking the chance of crossing before the train reached that point.

In Davey's case, the facts were that the plaintiff was crossing the defendants' railway on foot; there were two tracks or lines. In crossing the first, he looked in one direction, that is, along what is called the down line, standing on which he could see for several hundred yards in both directions, but he admitted that he did not look along the up line, and if he had, would have seen an approaching train which, on stepping on the up line, struck him and caused the injuries for which he sued. The engine driver did not whistle. There was a gatekeeper employed by the company who, at the time of the accident, stood at the opposite side of the crossing talking to two boys, and with a furled flag in his hand, who gave no warning to the plaintiff. Upon these facts appearing at the trial, Huddleston, B., nonsuited the plaintiff. The Queen's Bench Divisional Court upheld the nonsuit; Mr. Justice Manisty not assenting, but not formally dissenting. Lord Coleridge, C.J., after stating the rule of law as above, said (page 217): "Now it seems to me clear, upon the uncontradicted evidence of the plaintiff himself, that he himself caused the accident by walking straight into a train which he might have seen. There is a double line of rails. He comes first upon the down line on which the train is not coming. There is then the width of the down line, and the interval between the two sets of rails between him and the danger. If he had only taken the precaution of looking to the left along the up line while crossing over this space, he must have seen the coming train. He did not look to see what was plainly to be seen approaching, and in consequence he walked straight into the danger.

"The suggested answer to this way of putting the case is as fol-

lows: It is said that the plaintiff was not bound to look along the line for two reasons; first, because it was a dangerous crossing and the defendants were bound to whistle, or do something or other by way of warning people of the approach of the train. It is not contended that there was any whistling, and therefore it is said that the defendants were negligent. Secondly, it is said that there was a man there, and it was his duty to warn persons when he knew that a train was coming, and that if he had warned the plaintiff he would not have come across. Now I am not disposed to lay it down as a general proposition that a train must always whistle on approaching a level crossing. . . . If on the one hand it is said that a person crossing might reasonably look for warning if a train was coming, on the other hand the answer seems to be that the gatekeeper might reasonably rely on a person's looking up and down the line to see if a train was coming before crossing."

In the present case the evidence clearly establishes that the train did whistle at a point over half a mile above or west of the crossing, and that the whistle was heard at a point considerably east of the crossing, and so there was the warning that the statute requires, but not given at the time and place required. For the purpose of announcing the approach of the train to one about to cross the railway, this whistle would be reasonably sufficient to put a prudent person on his guard, and the liability of a railway company cannot surely be made to depend on the warning being given at the exact distance and in the precise manner indicated by the statute.

The statute imposes a penalty for omitting to ring the bell or sound the whistle, and also makes the company liable for all damages sustained by any person by reason of the neglect. Under this provision it seems to me that the burden of showing that the deceased was injured by the omission to ring the bell or sound the whistle must rest upon the plaintiff, and it is not sufficient for the plaintiff to prove the omission and then an injury at the crossing to entitle him to succeed. In the absence of evidence of circumstances that would show the party injured might reasonably be unaware of the approach of a train through no neglect or fault of his own, there is a failure to show affirmatively that the omission to ring the bell or sound the whistle caused the damage. In the case of a deaf person the ringing of a bell or sounding of the whistle would give no warning, and it seems to me it would be absurd to say that the company would be liable to such a person who crossed without using his eyes to assist in avoiding an approaching danger. The omission there to sound the whistle or ring the bell would certainly not be the *causa causans*, and a man with all his faculties about him is not justified in trusting to one sense—that of hearing alone—when by the use of his sight he could easily avoid danger; and if he does so trust he ought to take the conse-



quences of his imprudence, and not shift the burden on to those who did not intend to injure him, but omitted some duty that might or might not have had the effect of preventing the accident.

The language of Denman, J., was even stronger than that of the Chief Justice in Davey's Case. It was (p. 219): "I think that the undisputed facts of this case show that this accident was palpably and unquestionably due to the plaintiff's own folly and recklessness and nothing else. The argument for the plaintiff appears to be that he was not guilty of folly and recklessness for two reasons; first, because there was no whistle to announce the approach of the train, and therefore he was not bound to expect the coming of a train. It seems to me that the argument entirely fails. According to his own account before he attempted to cross the line of rails on which the accident took place he had to cross the down line, and from thence it was possible to see for a long distance along the line either way. He saw that no train was coming on the down line, but he did not take the trouble to turn his eyes and look along the up line. If he had he could have seen three or four hundred yards. It seems to me it is no answer to the contention that the accident resulted from his own folly that there was no whistle, for I do not see that the absence of a whistle played any material part in causing the accident."

The language of both the Chief Justice and Mr. Justice Denman fits the circumstances of this case as closely and clearly as it did the circumstances of the case in reference to which it was used. Here the evidence shows that the deceased was thoroughly acquainted with the locality; that he was in a position to have heard the whistle of the approaching train when sounded at a distance of 992 yards from the crossing where he was killed, as he must, when that whistle sounded, have been somewhere between two and three hundred yards from the crossing, taking the course he travelled to be laid down on the map filed with any degree of accuracy; and it was not disputed that the plan did correctly show the course he travelled. Then at a point about 150 or 160 yards from the crossing he passed in his buggy the witnesses Abigail Taggart and Amelia Taggart. These girls were 50 or 60 yards from the rail, in a course nearly at a right angle to the railway. According to Abigail's evidence they were on the road deceased was travelling when deceased passed. They saw the light of the engine, and ran to the track to see it pass. They got to the edge of the ditch at the railway just as the engine passed, and got on the track, when, by the headlight of the engine, they saw the horse going on to the track at the crossing, and the collision take place. It was then dark, and they were 150 or 160 yards from the crossing. It is thus manifest that the engine had a pretty strong light, and that a person at the crossing, if he had looked, must have seen it. The girls saw the light through the trees, and heard the rumbling of



the engine. Peter Dickson, a witness for plaintiff, heard the whistling at Lossing's Crossing, when he was at about 80 rods from the crossing where deceased was killed, and heard the whistle afterwards after the accident. He was, as I understand his evidence, standing on the road at the Newport Crossing at the time, talking to a person there. He was 80 rods away, and could hear the train approaching.

Edward Everett swore that he saw deceased at about a mile from Cainsville; that deceased followed after him. Witness stopped at Westbrook's hotel, and deceased went up the road towards the track. Witness tied his horse up in the shed, and just as he got through he heard the whistle at about Lossing's Crossing, he thought. He and George Dick, a person with him, when 128 paces from the stone crossing, heard the whistle, and ran to the track to see the train go by, and got there just in time to see it pass. He watched the train, and heard the crash at the crossing below.

It is manifest then that if the deceased had been looking out for the train he must have seen it, and if he did not look out, there being nothing to obstruct his view of the track, shown by the evidence for the plaintiff, and it appearing from that evidence that the view along the track was unobstructed from the stone crossing to the place of the accident, it was his own fault that he did not see it.

If the deceased had looked for the train he must have seen it, and if he saw it he took the risk of crossing, and thus recklessly rushed to his own destruction. If he did not look for the train, he neglected a precaution that every prudent man would or ought to have taken, and his death was not caused by the defendants' neglect to ring the bell or sound the whistle, but by his own want of care. The facts would thus seem to bring the case clearly within the *ratio decidendi* in *Davey v. The London & South-western Ry.* The fact that in this case a statutory obligation upon the defendants existed, which did not exist in that case, does not interfere with the principle of the decision, and there being no facts or circumstances given in evidence from which the going upon a railway track in front of an approaching train could be assigned to any other cause than a neglect of ordinary care and caution, there was nothing that could properly have been submitted to the jury on the question of contributory negligence.

Whether that question is for the decision of the Court or the jury, must depend upon the circumstances of each case.

In *Davey's Case* in Appeal the Master of the Rolls upon this point thus states his opinion, at p. 71 of the report, 12 Q. B. Div.: "In this case I have come to the conclusion that the evidence of the plaintiff himself was so clear that there was no room for any question to be asked the jury, which they were entitled to answer

in any but one way. If that was so, I think all the authorities show that the Judge was entitled to withdraw the case from the jury. Now in such an action as this the burthen of proof lies entirely upon the plaintiff. There are two things for him to establish, one is affirmative and the other negative. It is for the plaintiff to show that the accident which happened to him was caused by a negligent act of the defendants or of those for whose negligent acts the defendants are liable, and that that accident was produced as between him and the defendants solely by the defendants' negligence in this sense, that he himself was not guilty of any negligence which contributed to the accident, because even though the defendants were guilty of negligence which contributed to the accident, yet if the plaintiff also was guilty of negligence which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and of the defendants, then the plaintiff cannot recover, it being understood that if the defendants' servants could by reasonable care have avoided injuring the plaintiff, although he was negligent, then the negligence of the plaintiff would not contribute to the accident."

Here the omission either to sound the whistle or ring the bell did not necessarily cause the accident. It might have happened just as it did if the bell had been rung and the whistle sounded. It at most was, so to speak, a failure on the part of the defendants to furnish a kind of safeguard which if heeded by the deceased might have rendered the occurrence of the accident less likely. The not providing this safeguard was negligence on the part of the defendants. The neglect of deceased, if he did so neglect, to look out for an approaching engine, or his attempting to cross the track in the face of it, was negligence on his part, the two combined leading to the deceased's injury, and making that joint negligence which deprives the plaintiff in the opinion of the Master of the Rolls of a right to recover, there being no evidence whatever, that after the occurring of the negligence of the deceased any care on the part of the defendants' servants on the engine would have avoided the injury.

The case of the *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1155, which has recently been accepted as deciding that the question whether there has been contributory negligence on the part of a plaintiff or not is one of fact for the jury, was cited in *Davey's Case* and considered by the Court; and while on the facts there presented it was held the question was for the jury, the case does not go the length of affirming that in no case may that question be taken into the hands of the Court and withdrawn from the jury. I do not think the fact that in *Davey's Case* the plaintiff gave evidence, and admitted that he did not look and might have seen the approaching train if he had looked, makes the case stronger against him than it would have been if it ap-

peared from other evidence that he was in a position to see and did not look for the approaching train, or, seeing it, ran the risk of crossing; and we have Lord Justice Bowen, in the Davey Case, asking, as he does at page 77, under the circumstances presented in that case: "Now is it open to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man who never looked at a train which was within a few feet of him?"

If the view of the track had been obstructed by houses along the approach to it, or if the deceased had been a stranger in the place, unacquainted with the locality and ignorant that he was approaching a railway, there might have been something from which a jury could infer that he was not guilty of negligence or want of care in approaching the crossing, and then the omission to sound the whistle or ring the bell, which would be the only means of his knowing that he was in the neighborhood of a railway crossing, might be said to be the act of negligence that led to the accident, because there would be nothing in the case to show that he would not have refrained from crossing had he heard the warning.

But in this case there was the knowledge of the deceased of the locality, the alarm remoter than the statute required, but still the signal that the train was coming, the noise its approach made, the light the engine caused making it visible at a long distance, and nothing to obstruct the view—all circumstances to displace a want of knowledge on deceased's part that the train was approaching when he made the attempt to cross the track; and no evidence whatever to show that he was not aware of its approach, unless the danger he incurred in attempting to cross is to be taken in the place of evidence of such want of knowledge; and if this alone was sufficient evidence to go to the jury of the absence of contributory negligence, which, as I understand Davey's Case, the plaintiff must show, that case was wrongly decided. It, however, seems to me a decision based on good common-sense, that no one should be allowed to impose upon others a liability for injuries that by a reasonable amount of care on his part would be avoided.

If in a Court of Justice the consideration of what would be best in the public interest could be allowed to influence the mind of Judges in determining the rights of individuals, I would say that in my opinion it would be in that interest to require all persons to take extreme care in crossing a railway on a level, and hold them not entitled to compensation if injured while crossing without such care, even though the railway company's servants omitted to perform the obligations the law imposes upon them, leaving such breach of duty to be punished by the imposition of the penalty the statute provides. No one, however, resorts to that method of punishment, which in all probability would be visited to some extent on the defaulting railway servant; and it is simply absurd

to suppose that an engine driver could have enforced against him, with his wages at \$30 a month, a verdict for \$4000 or \$10,000, as the case might be, to the extent of half thereof. The company must suffer the burden, and it has not the public assistance in enforcing the law against its neglectful servants, though it must in common with the public be anxious that all that the law enjoins to secure safety should be rigidly observed. The appeal, in my opinion, should be allowed, and the order *nisi* for a nonsuit in the Divisional Court made absolute.

ROSE, J.—We are asked to say that this case is concluded by the Davey Case, and that because there the plaintiff was nonsuited, on his own admission that he had only looked one way, and could have avoided the accident had he also looked the other way, here the plaintiff must fail because it is alleged the deceased looked neither way.

The answer is twofold.

1. After the plaintiff had satisfied the jury that the defendants were negligent, the onus was then upon the defendants to convince the jury that the deceased was guilty of contributory negligence.

2. The question thus being for the jury, could the learned Judge at the trial have ruled that the evidence offered by the plaintiff showed that the deceased did not look in the direction from which the train approached? This is on the supposition that the decision in the Davey Case is perfectly applicable to cases arising in this country, which, for the reasons given by my brother Patterson, is doubtful.

In Smith's Law of Negligence, p. 153, the learned author thus states the rule:

"It is well in considering the doctrine of 'contributory negligence' to remember that after the plaintiff has shown that the defendant has been negligent, then the defendant has to show: 1st, that the plaintiff has been negligent in respect of the matter complained of, and might have avoided the consequence of the defendant's negligence; 2dly, that his negligence has been of such a character that the defendants could not avoid its effects."

The concluding words of the judgment of the Master of the Rolls, as quoted by my brother Patterson, seem to affirm this second proposition.

The case of *Davies v. Mann*, 10 M. & W. 546, will also illustrate the same proposition. On p. 155 of Mr. Smith's work we find this illustration: "Suppose the defendant sitting in his trap negligently tied his reins to it and fell asleep and his horse started off, the plaintiff negligently was playing pitch and toss in the street; the defendant having awoke could by ordinary care avoid running over the plaintiff, but he was too idle to untie the reins." He adds: "The defendant is liable."

Varying the illustration, suppose that instead of neglecting to untie the reins he had neglected to call out and warn the plaintiff, and that if he had so warned him the plaintiff could have heard and have escaped, would he be any the less liable?

It seems to me that the Legislature—recognizing the fact that many of the public, engrossed with anxious thought, afflicted with absent-mindedness, near-sightedness, rendered inattentive to the path upon which they are travelling, by reason of so frequently passing over it that their attention is not called to the particular portions over which they are passing at any particular moment, stand in need of warning, that they are in no particular danger from drivers of horses, who can either rein in their steeds, or give warning by the voice, and that if such drivers are negligent they are held responsible—determined to place the drivers of locomotive engines, who cannot stop the train at every place of danger, under the imperative obligation to give warning to such persons as above described at each and every place where they may possibly be when the train is passing. If such warning voice, either of bell or whistle, is not given, then, in my opinion, the onus lies on the owners of such engine to show, that though the plaintiff or deceased had been negligent, the negligence was of such a character that the defendant could not avoid its effects.

If the person injured were deaf, then it would clearly appear that such warning sound, if it had been given, would not have enabled the person so injured to avoid the accident, and the deaf person could not thus claim that the accident was caused by the neglect to give the warning.

If, however, the warning was not given, and if given might have availed, it seems to me to be doing away with the effect of our statute to shift the onus on to the plaintiff of showing that he was not guilty of contributory negligence, instead of leaving it where the statute has placed it, viz., on the defendants. If the law was as is contended here, viz., that the onus was on the plaintiff, not only affirmatively to show negligence, but also to negative contributory negligence on his part, I might be able to understand the logical force of the fourth reason of appeal, viz.: "If the deceased attempted to cross the railway track without looking for the locomotive, he was guilty of contributory negligence. If, on the other hand, he looked he must have seen the locomotive, and in that sense was guilty of contributory negligence, and so in either event there was nothing to submit to the jury, but the Court should have withdrawn the case from the jury or directed a judgment for the defendants."

The result of such reasoning would, I fear, prevent in most cases recovery against the defendants, when the person suffering the accident was killed instantly, and thus unable to give evidence.

Mr. Bethune admitted that the only evidence as to whether the

deceased looked or not was that of Amelia Taggart, pp. 22-3 of the appeal book. She said on cross-examination, line 40, that he was looking "right ahead, right straight ahead."

"Q. If he was looking in the same direction as you he would have seen it? A. There was a house.

"Q. That was only an instant? A. Yes.

"Q. Don't you think he could have seen it as well as you? A. There was quite an orchard, he was in a buggy. I cannot say if he would or could have seen it.

"Q. He would be higher up than you, and he would have as good an opportunity as you? A. I don't think so, he was looking between the orchard and the house.

"Q. That would be only an instant, there is only one house? A. Yes.

"Q. Not a very big house? A. No.

"Q. Once he got past that he would have an opportunity of seeing the engine? A. I suppose he would."

Can one reasonably say that the *only* conclusion to be drawn from this evidence is, that the deceased did not look in the direction from which the train was coming? Might it not have been that as he approached he did look, did not see the train (the jury say it was "going unusually fast," that the bell was not ringing, nor was the whistle sounded), and not hearing the bell or whistle, drove on in fancied security until struck down and killed.

As to this issue, the company were in the position of plaintiffs. Could the Court say that a jury were perverse because on such evidence they refused to be satisfied that the deceased did not look? I am unable to accede to such a contention.

I agree that the appeal must be dismissed, with costs.

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## WESTERN AND ATLANTIC R. R. Co.

v.

KING.

(70 Georgia Reports, 261.)

A railroad company is liable for any damage done to persons, stock, or other property by the running of its trains, unless the company shall make it appear that their agents exercised all ordinary and reasonable care and diligence to prevent such damage; but where, in an action for killing a horse, the court, after charging this principle, added, "that is, might say, a full measure of care and diligence—all that could be expected," such charge was error; the effect of it being to require extraordinary diligence of the company.

Negligence is a question for the jury alone; and for the judge to instruct



them that if the law provides that the trains shall run a certain speed, and they were running above that speed, it was negligence, was error.

Mrs. KING brought suit for damages against the Western & Atlantic R. R. for killing a horse and destroying a buggy. The case originated in a justice's court, but was carried to the superior court by appeal. On the trial, the plaintiff contended that the train of the defendant had run against the horse and buggy at a road-crossing, killing the horse and demolishing the buggy. The defendant contended that the horse had become frightened and run away, and that the train happening to be passing the road-crossing at the time, the horse ran into it without fault on the part of the defendant. There was conflicting evidence as to speed of the train, etc., not necessary to set out in detail. The jury found for the plaintiff. Defendant moved for a new trial on various grounds, the only material ones being set out in the decision. The court overruled the motion, and defendant excepted.

A. N. Starr and R. J. McCamy for plaintiff in error.

W. R. Rankin and E. J. Kiker for defendant.

CRAWFORD, J.—The refusal of the court below to grant a new trial, upon the grounds set out in the motion therefor, brings the case to this court.

The first ground of the motion is, that the judge erred in charging the jury as follows: "If you find from the testimony, that the cars or machinery of the company caused this injury, the burden is then changed, and it is upon the company to show that their agents or employees in charge of the train, exercised all reasonable and ordinary care of diligence, that is might say, a full measure of care and diligence, all that would be expected."

By § 3033 of the Code, it is declared that a railroad company shall be liable for any damage done to persons, stock, or other property by the running of their trains, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence to prevent such damage. Section 2061 defines ordinary diligence to be that care which every prudent man takes of his own property; and § 2062 that extraordinary diligence is that extreme care and caution which very prudent and thoughtful men use in securing and preserving their own property.

Looking at the charge of the court in the light of the statutory duty put upon the company, it will be seen that the judge required more of it than the law imposes. Had the instructions ceased on that point after telling the jury that the company was bound to exercise all reasonable and ordinary care and diligence, they would have been in exact harmony with the statute. But when he added, by way of explanation, "that is, might say, a full measure of care and diligence, all that could be expected," he undoubtedly erred. A full measure of care and diligence, all that could be expected,

could, in no reasonable view, be held to be less than extraordinary diligence; and this is more than is required by law.

The next ground of the motion which we notice is that the judge charged the jury, "If, also, the law provides that they shall run at a certain speed, and they were running above that speed, it would be negligence." This court has repeatedly ruled that negligence was a question alone for the jury, and that for a judge to instruct them what was, or was not negligence, was error. The legal principle upon which this rule rests is so clearly stated by Harris, J., in the case of *Wright v. The Georgia R. R. & Banking Co.*, 34 Ga. 337, that we reproduce it here; he says: "The jury alone have the right of the determination of this question. It is a complex and difficult matter, often, to decide, as many considerations enter into it, and rarely any fact, of itself, is sufficient to establish it clearly. If it had been a fact proved, that the axle was too short, still, beyond that was necessary the testimony of some expert or persons familiar with the running of cars, to show that that was the cause of the accident; certainly the judge has no right to determine what constitutes negligence."

As there has been no departure from, or modification of this rule, we hold that the charge complained of was error, and that the new trial should have been granted in this case.

Judgment reversed.

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PEOF

v.

MICHIGAN CENTRAL R. Co.

(*Advance Case, Michigan. May 18, 1885.*)

Where a flagman in the employment of a railroad company has for several years been in the habit of warning persons about to cross the main line of the railroad of the approach of trains, but was not employed by the railroad company to watch such main track, the company will nevertheless be liable if he so negligently discharges his assumed duty as to the main track that a party attempting to cross is led into a place of danger, and injured without any want of care on his own part concurring to produce such injury.

ERROR to Jackson.

Thomas A. Wilson for plaintiff and appellant.

Gibson & Parkinson for defendant.

CHAMPLIN, J.—Mechanic Street is one of the principal streets in the city of Jackson, running from the centre of the city to the State's prison. The railroad belonging to the defendant company

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crosses Mechanic Street on a bridge some 15 feet above the highway. The railroads of the Jackson, Lansing & Saginaw R. R. Co. cross Mechanic Street, on a level therewith, about 50 feet north of defendant's road. This road is also used by the Grand River Valley R. R. Co. The Jackson, Lansing & Saginaw and the Grand River Valley railroad companies' roads are under the control of and operated by defendant. Clinton Street runs west from Mechanic Street and intersects it just south of the railroad bridge. The defendant has for several years employed a flagman who was stationed at the intersection of the Jackson, Lansing & Saginaw R. R. with Mechanic Street, whose duty it was to prevent, so far as he could do so, accidents at the crossing of the Jackson, Lansing & Saginaw R. R. with Mechanic Street. He had received no instructions relative to performing any duty with reference to the passing of trains upon the Michigan Central R. R., but he had, on his own responsibility, assumed to warn travelers with vehicles upon Mechanic Street of the approach of trains on the defendant's road, which would pass over the bridge in question. The diagram will indicate the position of the streets and roads referred to.

On the twenty-first of November, 1881, the plaintiff and her sister were passing along Mechanic Street in a buggy drawn by a single horse. They approached the railroad bridge from the south, and when within about 10 rods from the bridge, they saw the flagman stationed at the crossing making signals for them to stop. They were about to do so, when he again signalled them to go forward, which they did, and had nearly reached the bridge when a passenger train from the west passed over the bridge in front of and nearly over them. She turned her horse to the west, when he threw up his head, gave a spring to the west, and threw her out. She was driving the horse at the time of the accident. When she fell from the buggy she dropped the lines, and the horse started to run on Clinton Street, but was stopped in a short distance by her sister, who remained in the buggy and recovered the lines. The plaintiff was seriously injured.

The plaintiff in her declaration alleges that it was necessary, and the duty of the defendant, to have and keep, and the defendant then and there kept, a flagman at the place where said railroads cross said streets, whose duty it was then and there to warn persons passing along said street with teams and vehicles of the approach of trains of cars upon said railroads, and to prevent teams and vehicles from passing underneath the track of said Michigan Central R. R. when trains were passing along the same and over said street; that plaintiff understood from the acts and motions of the flagman that she could pass said railroad track safely before said train of cars would arrive at said street, and she then drove forward; and when she had reached a point nearly under the

Michigan Central R. R. track the flagman motioned them to stop, and while so waiting the train passed on the Michigan Central R. R., nearly over the horse, which thereby became frightened and unmanageable, and turned suddenly, and threw plaintiff out of said buggy upon the ground with great force and violence, "whereby, and by means of the premises, and by reason of the gross carelessness and negligence of said defendant and of said defendant's agent and servant, said flagman, in motioning and beckoning the plaintiff and her said sister to go forward, as aforesaid when they were at a safe distance from said railroad, and in motioning them to stop as aforesaid, when they might then and there have gone forward, and without any fault or negligence on the part of the plaintiff or her said sister, the plaintiff was then and there greatly hurt, and injured internally and in her back and in one of her limbs, and otherwise hurt, bruised and injured."

The plaintiff called the flagman as a witness, but he testified positively that the company did not employ him to flag trains on the main line, and gave him no instructions to do so. He admitted that he had assumed to do so, and had for years warned people of the approach of trains on the main line to avoid accidents. The court directed a verdict for the defendants. This, we think, was error. The flagman was the servant of defendant. Although he may have had no positive instructions to perform any duties in connection with the main line, or to warn persons with teams and vehicles of the approach of trains on the main line, yet the fact that he had uniformly performed such duty for several years was competent evidence to be submitted to the jury as tending to prove that he was so acting by the express or implied assent of defendant; and if the jury should be satisfied from the evidence that the flagman was performing the duty of warning persons of the approach of trains on the main line by the direction of the defendant, then it would be liable if its servant so negligently discharged his duty in that respect as to lead the plaintiff into a place of danger from which she received an injury by reason of such negligence, her own want of care not concurring to produce such injury. The case should have been submitted to the jury under proper instructions from the court.

The judgment must be reversed and a new trial granted.  
(The other justices concurring.)

**Company not Bound at Common Law to Provide Flagmen.**—When there is not any statute requiring it, a railroad company is not ordinarily held bound to provide flagmen at a point where a highway crosses a railroad. *Commonwealth v. Boston & W. R. Co.*, 101 Mass. 201; *Shaw v. Boston & W. R. Co.*, 8 Gray, 45; *Bailey v. New Haven & N. R. Co.*, 107 Mass. 496; *State v. Phila., W. & B. R. Co.*, 47 Md. 76; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; s. c., 39 N. Y. 61; *Grippen v. New York Central & H. R. R. Co.*, 40 N. Y. 34; *Weber v. New York Central & H. R. R. Co.*, 58 N. Y. 451; *Culhane v. New York Central & H. R. R. Co.*, 60 N. Y. 133; *McGrath v. New York Central &*

H. R. R. Co., 63 N. Y. 522; *Stapley v. London, B. & S. C. R. Co.*, L. R. 1 Exch. 21; *Stubley v. London & N. W. R. Co.*, L. R. 1 Exch. 18; *Bigbee v. London, B. & S. C. R. Co.*, 18 C. B. (N. S.) 584; *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Delaware, L. & W. R. Co. v. Toffey*, 9 Vroom (N. J.), 525; *Phila. & Reading R. Co. v. Killips*, 88 Pa. St. 405; *Haas v. Grand Rapids & Mich. R. Co.*, 47 Mich. 401; s. c., 8 Am. & Eng. R. R. Cas. 268; *Welsch v. Hannibal & St. Jo R. Co.*, 6 Am. & Eng. R. R. Cas. 75; *Maryland Central R. R. Co. v. Newbern*, *infra*.

**Exception as to Places of Peculiar Danger.**—But under certain circumstances of great danger it has been held the duty of a railroad company to provide a flagman, though there may be no statute requiring it. *Cliff v. Midland R. Co.*, L. R. 5 Q. B. 258; *Penna. R. Co. v. Matthews*, 7 Vroom (N. J.), 531; *Phila. & Reading R. Co. v. Killips*, 88 Pa. St. 405; *Illinois Central R. R. Co. v. Ebert*, 74 Ill. 399; *Johnson, Adm'r, v. St. Paul & D. R. Co.*, 15 Am. & Eng. R. R. Cas. 467.

**Question of Duty to have Flagman is not for Jury.**—Ordinarily the question of whether or not a railroad company, is bound to provide a flagman at a railroad crossing is held not to be a proper one to submit to the jury. *State v. Phila., W. & B. R. Co.*, 47 Md. 76; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Besiegel v. New York Central R. Co.*, 40 N. Y. 9; *Weber v. New York Central & H. R. R. Co.*, 58 N. Y. 451.

**Failure to have Flagman may go to Jury as Part of Res Gestæ upon Question of Negligence.**—But some authorities allow the fact of no flagman being provided to be submitted to the jury as part of the *res gestæ* upon the question of negligence. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61; *McGrath v. N. Y. Central & H. R. R. Co.*, 59 N. Y. 468; s. c., 63 N. Y. 522; *Casey v. New York Central & H. R. R. Co.*, 78 N. Y. 518; *Eaton v. Fitchburg R. R.*, 2 Am. & Eng. R. R. Cas. 183; *Penna. Co. v. Hensil*, 6 Am. & Eng. R. R. Cas. 79; *Kelly v. St. Paul, etc., R. R. Co.*, 6 Am. & Eng. R. R. Cas. 93; *Kansas Pacific R. Co. v. Richardson*, 6 Am. & Eng. R. R. Cas. 96.

**Liability of Railroad Company for Negligence, Absence, and Misconduct of Flagman.**—When a railroad company voluntarily places a flagman at a railway crossing, it will be held liable for all accidents occasioned by his neglect, absence, or misconduct. *Phila. & Reading R. R. Co. v. Killips*, 88 Pa. St. 405; *Warren v. Fitchburg R. Co.*, 8 Allen, 227; *Wheelock v. Boston & A. R. Co.*, 105 Mass. 208; *Delaware, L. & W. R. Co. v. Tobbey*, 9 Vroom (N. J.), 525; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9; s. c., 39 N. Y. 61; *Warner v. New York Central R. Co.*, 44 N. Y. 465; *Kissenger v. New York & H. R. R. Co.*, 56 N. Y. 538; *Besiegel v. New York Central R. Co.*, 34 N. Y. 622; *McGovern v. New York Central & H. R. R. Co.*, 67 N. Y. 417; *Dolan v. Delaware & H. C. Co.*, 71 N. Y. 285; *Casey v. New York Central & H. R. R. Co.*, 78 N. Y. 518; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 368; *Lunt v. London, etc., R. Co.*, L. R. 1 Q. B. 277. And where one company has usually had a flagman at a crossing it is negligence to remove him without fully notifying the public. *Pittsburgh, C. & St. L. R. Co. v. Grindt*, 3 Am. & Eng. R. R. Cas. 502.

**Failure to post Flagman or give Signal does not Exempt Party approaching Crossing from Obligation to Stop, Look, and Listen.**—The failure upon the part of a railroad company to post a flagman at a crossing or to give an appropriate signal on approaching a crossing does not exempt a traveller upon the highway from the ordinary obligation of stopping, looking, and listening. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697; *Harlan v. St. Louis, etc., R. Co.*, 64 Mo. 480; *Havens v. Erie, etc., R. Co.*, 41 N. Y. 296; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Toledo, etc., R. Co. v. Riley*, 47 Ill. 514; *Galena, etc., R. Co. v. Dill*, 22 Ill. 264; *Phila. & R. R. Co. v. Boyer*, 2 Am. & Eng. R. R. Cas. 173; *Pennsylvania R. R. Co. v. Richter*, 2 Am. & Eng. R. R. Cas. 220.

But see, contra, *Harty v. Central, etc., R. Co.*, 42 N. Y. 468; *Levy v. Great Western R. Co.*, 48 N. Y. 675; *Zeigler v. Railroad Co.*, 5 S. C. 221; *Galena, etc., R. Co. v. Loomis*, 18 Ill. 548; *Chicago, etc., R. Co. v. Reid*, 24 Ill. 144.

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MARYLAND CENTRAL R. R. Co.

v.

NEWBERN.

(*Advance Case, Maryland.* 1884.)

In an action against a railroad company for an injury sustained at a crossing, the evidence both as to negligence and contributory negligence was held to be such as ought properly to have been submitted to the jury.

In an action for an injury at a railroad crossing it is error to instruct the jury that even if they find that the plaintiff was guilty of want of due care and prudence in attempting to cross the track, still they should find for him unless they should further find that the railroad company could not by the exercise of care and diligence on its part have avoided the accident. Such instruction should be modified by the statement that in order to enable him to recover the plaintiff must show knowledge on the part of defendant or its agents of the plaintiff's peril, and that there was sufficient time after such knowledge had been acquired within which to make an effort to save the plaintiff from the impending danger.

In the absence of statutory requirements there is no legal obligation on a railroad company to keep at the crossings of the public county roads flagmen to give warning to travellers on such roads of the passing of trains.

It is the duty of travellers, before crossing the tracks of a railroad, to stop and listen for the approach of a train, and the absence of a flagman or of signals given by the train does not excuse the want of this precaution.

It is error for the court to instruct the jury that they may, in considering the whole case, "infer the absence of fault on the part of the plaintiff, from the known disposition of persons to avoid injuries to themselves," in the presence of testimony that tends strongly to show the existence of fault.

THE opinion states the facts.

C. E. Fendall and R. R. Boarman for plaintiff in error.

Wm. J. Taylor and D. G. McIntosh for defendant in error.

ALVEY, J.—This is an action brought to recover for injuries received by the plaintiff in consequence of the alleged negligence of the defendant. The injuries resulted from a collision with a locomotive engine of the defendant, at a crossing by the railroad of a public county road, while the plaintiff was in the act of crossing the railroad track, in a covered wagon, drawn by one horse. And the verdict and judgment being for the plaintiff the defendant has appealed.

At the trial it was sought to take the case from the jury by a



prayer for instruction that there was no sufficient evidence to be considered by them of negligence of the defendant to entitle the plaintiff to recover; and further, assuming that there was such negligence on the part of the defendant, that the evidence showed such contributory negligence on the part of the plaintiff as disentitled him to recover.

But without going into any detail statement of the evidence, this court is of opinion that the court below was entirely right in refusing to withdraw the case from the jury, upon the theory that there was no evidence of negligence by the defendant, or by instructing them as requested by the defendant, that the evidence showed such contributory negligence on the part of the plaintiff, that assuming all the evidence in his favor to be true he had shown no ground upon which he could recover. On the contrary, if the testimony of the plaintiff and his daughter, as set out in the bill of exception, be accepted as substantially correct, as to the caution exercised by the plaintiff in approaching the crossing, and that he did not see, and could not, by the exercise of reasonable care and caution, have seen the approach of the train, and that there were in fact no signals given of its approach as required, such as the blowing the whistle, or the ringing the bell, and that it was by reason of such omission that the accident occurred, then it is clear there was such negligence on the part of the defendant as to render it liable for the consequences of the collision. But on the other hand, if the evidence given on the part of the defendant be true, it is equally clear that the plaintiff, by his own want of caution, did contribute to the production of the injury complained of, and consequently he could have no right to recover. It was a case of conflicting evidence as to the main facts involved, and was therefore purely a question for the jury as to the comparative credit and weight of evidence, and the court could not do otherwise than submit it to the jury for their determination. There was, therefore, no error in refusing to take the case from the jury.

In regard to the instructions given to the jury on behalf of the plaintiff, we think there was error. While some of these instructions, as general abstract propositions, may be correct, others are based upon hypotheses of fact that do not necessarily determine the case in favor of the plaintiff, though they conclude to the right of the plaintiff to recover. This is obviously so as to the second of these instructions. By that instruction the jury were told that although they might find that the plaintiff was guilty of the want of due care and prudence in attempting to cross the railroad track, and that he got incautiously upon such track at the time and place mentioned in the evidence, yet their verdict must still be for the plaintiff, if they should find that he was injured by the defendant's train, unless they should further find that the

defendant could not, by the exercise of care and diligence on its part, have avoided the accident.

This instruction failed to define with accuracy the relative duties and obligations of the parties, having proper regard to the nature of the accident and the facts of the case. Possibly the defendant might have avoided the accident if a flagman had been placed at the crossing to warn off the plaintiff or by the constant sounding of the whistle and the ringing of the bell as the train approached the crossing; and under the instruction the jury were at liberty to conclude that the omission of any of these precautions by the defendant was negligence of itself, and if they had been observed the accident would not have occurred, and therefore the defendant was liable for the injury to the plaintiff, notwithstanding they might find that the plaintiff recklessly pushed forward to cross in advance of the approaching train without observing any precaution on his part. Such proposition is not sustainable either upon reason or authority. The general principle is that where both parties by their negligence directly contribute to the production of the accident neither has a right to recover of the other for injuries sustained thereby. But there are exceptions to this general rule; and in cases like the present the exception is, that if the defendant, or those acting for it, had become aware of the perilous situation of the plaintiff, though that peril had been incurred by the negligent or even reckless conduct of the plaintiff, yet the defendant or its agents would be bound to use all reasonable diligence to avoid the accident. But in order that this qualification of, or exception to, the general rule may be successfully invoked by the plaintiff, he must show knowledge on the part of the defendant or its agents of the peril in which he (the plaintiff) was placed, and that there was time after such knowledge within which to make the effort to save him from the impending danger. The second instruction wholly fails to define the condition of the case under which the defendant would be liable, assuming, as it does, both parties to have been guilty of negligence; and it was for that reason erroneous, and well calculated to mislead the jury. *Kean v. Balto. & Ohio R. R. Co.*, 61 Md.

In the absence of statutory requirement it is now well settled, at least by a great preponderance of authority, that there is no legal obligation on a railroad company to keep at the crossings of the public county roads flagmen to give warning to travellers on such roads of the passing of trains. It has been so held by this court, in the recent case of *State, use of Foy v. Phil., Wil. & Balto. R. R. Co.*, 47 Md. 76, 86; and many decisions of the highest courts of the country might be cited in support of that ruling.

The track of the railroad itself is a signal of danger to all those about to cross it; and travellers crossing the rails are bound to exercise reasonable care, having regard to the nature of the crossing for their own safety and protection. He should, in all cases, be-

fore proceeding to cross, carefully look and listen to ascertain whether a train is approaching; and the failure on the part of those in charge of the train to give the usual or required signals, such as the blowing of the whistle or the ringing of the bell, will not excuse or justify the traveller on the county roads in attempting to cross a railroad track, without the exercise of that reasonable precaution of looking and listening for the approach of a train. And if the experiment be made without such precaution the party acts at his peril; and in default of this precaution, if an accident occurs by a collision with a passing train, the traveller must be held to have so far contributed to his own misfortune as to preclude him the right to recover against the railroad company.

This is the established doctrine by the great weight of authority, and a large number of the decisions go to the extent of holding that it is incumbent upon the traveller at ordinary road crossings to stop, look and listen before attempting to cross the rails; and if he fail to observe this precaution he forfeits all right to recover for injuries received by collision. This precaution is not only reasonable and proper to be observed on the part of the traveller on public roads crossing railroad tracks for his own safety, but is equally necessary for the safety of the multitude of the people riding in the railroad trains, liable to be killed by collision of the train with obstacles on the track. Hence, courts have been strict and rigid in maintaining the rule requiring care on the part of those crossing railroad tracks.

Of the many decisions made upon the subject we may refer to the following: *Ernst v. Hudson R. R. Co.*, 39 N. Y. 61; *Wilcox v. The Rome, etc., R. R. Co.*, 39 N. Y. 358; *Beisiegel v. New York Central R. R. Co.*, 40 N. Y. 9; *Havens v. Erie R. R. Co.*, 41 N. Y. 296; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 502; *Butterfield v. The West. R. R. Co.*, 10 Allen, 532; *Penn. R. R. Co. v. Beale*, 73 Penn. St. 504; *Penn. R. R. Co. v. Weber*, 76 Penn. St. 157; *Telfer v. The North R. R. Co.*, 30 N. J. L. 188; *Bellefountain R. R. Co. v. Hunter*, 33 Ind. 335; *R. R. Co. v. Houston*, 95 U. S. 697, 702.

But without going the extent of many of the authorities and laying it down as an unqualified rule, applicable to all cases, that the traveller must actually stop, before attempting to cross the rails, to look and listen, we hold with the concurrence of all the authorities that he must at least exercise the reasonable precaution of looking and listening before venturing over the rails, and his failure to observe that precaution is negligence *per se*; and if he attempts to drive a vehicle across the tracks in view of an approaching train his conduct is worse than negligent—it is simply reckless. *Railroad Co. v. Houston, supra*; *Tilfer v. Northern R. R. Co., supra*; *Dascomb v. Buffalo & State Line R. R. Co.*, 27 Barb. 224.

Now applying these well-settled principles to the instructions

given in this case, it follows that the fifth prayer of the plaintiff granted by the court was equally defective as the second. While it assumed that the plaintiff may have attempted to cross the track without taking the necessary precaution to assure himself that there was no danger, the jury was thereby instructed that if there was no flagman present "and the plaintiff heard no whistle or bell, he had a right to suppose that in the absence of any signal or flagman there was no train at that time approaching." But as we have seen the law imposed no duty upon the railroad company to keep a flagman at the crossing, and the failure of those in charge of the train to sound the whistle or to ring the bell, if such were the fact, did not justify the plaintiff in attempting to cross, and thus to put himself in a position of possible danger without the exercise of reasonable care for his own safety. And the same objection applies to the sixth prayer of the plaintiff, which was granted by the court. To relieve the fifth and sixth prayers of objection they should have required the jury to find, as a fact, that the defendant, after discovering the perilous situation of the plaintiff, by the exercise of reasonable care, could have avoided the collision. If that be established as a fact the want of care by the plaintiff in driving upon the track would be no answer to his right to recover. But it was not the duty of those in charge of the train to anticipate the conduct of the plaintiff, and because they saw him approach the crossing to conclude that he would attempt to cross in advance of the train. On the contrary, they were or would have been fully justified in supposing he would not venture to cross until after the passage of the train. *Telfer v. Northern R. R. Co.*, 30 N. J. L. 188.

With respect to the last prayer of the plaintiff, granted by the court, and designated as No. 3, we need say but little. It embodies one of those general propositions only proper to be submitted to the jury in cases where there is a real doubt on the evidence as to the act or conduct of the party injured, in respect to the accident producing the injury; and it is only proper in such case as an aid in arriving at a conclusion from the whole evidence in the cause. While it is natural, and as a general rule rational, to presume that a party acts from incentives of self-preservation, this presumption can only be indulged in the absence of proof to the contrary. To instruct the jury that they may, in considering the whole case, "infer the absence of fault on the part of the plaintiff, from the known disposition of persons to avoid injuries to themselves," in the presence of testimony that tends strongly to show the existence of fault, is tantamount to instructing them that they may conclude as they please; that they may find upon presumption and put the evidence aside. There are cases where this presumption may be invoked, and the reports show many instances where it has been done. *Northern Central R. R. Co. v. Geis*, 31 Md. 357; *Railroad Co. v. Gladmon*, 15 Wall. 407; *Oldfield v. N. Y. & H. R. R. Co.*,

14 N. Y. 310; Penn. R. R. Co. v. Weber, 76 Penn. St. 157; Railroad Co. v. Rowan and wife, 66 Penn. St. 393.

But an indiscriminate use of the instruction given in this case cannot be otherwise than misleading in many cases, and we think the present not a case where it was proper to be given.

Of the prayers offered by the defendant they were all, except the fifth and seventh, properly refused. They were too indefinite and abstract in form to be of any essential aid to the jury in arriving at a correct conclusion upon the facts of the case.

The fifth prayer was conceded, and the seventh, we think, ought to have been granted. In the rejection of the others there was no error.

Judgment reversed and new trial awarded.

**Company Liable for Injury at Crossing occasioned by Negligence after becoming aware of Party's Peril, notwithstanding his Contributory Negligence.**—Notwithstanding the fact that a person has been guilty of contributory negligence in attempting to cross a railroad track without stopping, looking and listening, the company is liable for injuring him if the servants on the train after they see his danger could have avoided the accident but have failed to do so. *State v. Manchester, etc., R. R. Co.*, 52 N. H. 528; *Texas & Pacific R. Co. v. Chapman*, 57 Tex. 75.

As to the measure of care required on the part of the engineer in such cases, see *Bell v. Hannibal & St. Jo R. R. Co.*, 72 Mo. 50; s. c., 4 Am. & Eng. R. R. Cas. 580.

And see the following cases upon the same principle: *Northern Central R. Co. v. Price*, 29 Md. 420; *Kenyon v. New York, etc., R. Co.*, 5 Hun (N. Y.), 580; *Meyers v. Chicago, etc., R. Co.*, 59 Mo. 223; *Locke v. First Div. St. Paul & Pac. R. Co.*, 15 Minn. 350; *Baltimore, etc., R. Co. v. Trainor*, 33 Md. 542; *Paducah, etc., R. Co. v. Hoche*, 12 Bush. 41; *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 475; *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393; *Trow v. Vermont, etc., R. Co.*, 24 Vt. 494; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Colorado Central R. Co. v. Holmes*, 8 Am. & Eng. R. R. Cas. 410; *Zimmerman v. Hannibal & St. Jo R. R. Co.*, 2 Am. & Eng. R. R. Cas. 191; *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. R. Cas. 365; *St. Louis, Iron Mt. & S. R. Co. v. Freeman*, 4 Am. & Eng. R. R. Cas. 608; *Behrens v. Chicago, R. I. & P. R. Co.*, 6 Am. & Eng. R. R. Cas. 222; *Rains v. St. Louis, etc., R. Co.*, 5 Am. & Eng. R. R. Cas. 610; *Little Rock, etc., R. Co. v. Parkhurst*, 5 Am. & Eng. R. R. Cas. 635; *Chicago, etc., R. Co. v. Johnson*, 8 Am. & Eng. R. R. Cas. 225; *Swigert v. Hannibal & St. Jo R. R. Co.*, 9 Am. & Eng. R. R. Cas. 322; *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. R. Cas. 726; *Terre Haute & Ind. R. R. Co. v. Graham*, 12 Am. & Eng. R. R. Cas. 77; *Schwier v. New York, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 656.

**Flagmen at Railroad Crossings.**—For a full review of the question of the duty of a railroad company to post flagmen at a crossing, see *Peck v. Michigan Central R. Co.*, and note *supra*.

READING AND COLUMBIA R. R. Co.

v.

RITCHIE et al.

(102 *Pennsylvania State Reports*, 425.)

In an action to recover damages for alleged negligence, if the undisputed evidence discloses no negligence on the part of the defendant, it is error for the court to submit it to the jury as an open question.

Where there is affirmative and uncontradicted evidence of contributory negligence, by the plaintiff, the court should instruct the jury, that if they believe the witness, their verdict must be for the defendant.

It is error to submit to the jury as a possible element in the cause a supposititious case of which there is no evidence.

Failure on the part of a traveller crossing a railroad track at grade to stop, look and listen is not merely evidence of negligence, but negligence per se and a question for the court.

Where there is no direct evidence that the traveller did not stop, look and listen, the presumption of law that he performed his full duty will prevail; but where there is direct, affirmative and credible evidence to the contrary, the presumption of law is rebutted and will give way to the actual truth.

It is not negligence for a railroad company to run its trains over a public crossing in the open country at the rate of thirty miles an hour. It is only the force of special circumstances that requires a less rate of speed.

A. was killed by a railroad train at a public crossing, which was about nine hundred and fifty feet below a station. The train was not visible to one approaching the crossing by the public road until within twelve or fifteen feet of the rails, where the view was unobstructed to the station. When the train was in a cut, which hid it from view, some eighteen hundred feet from the scene of the accident, it blew a long, loud whistle. Upon coming within sight of the station, and seeing no signal to stop, it being a flag station, the engineer again whistled twice. These whistles were heard by various witnesses, two of whom were over one thousand feet beyond the crossing in question. The train passed the crossing at a rate of speed between twenty-five and thirty miles an hour, and struck and instantly killed A., who was driving in a closed carriage on account of rain. A. was last seen by one of defendant's witnesses, who testified that he did not stop as long as he (the witness) could see him, and that his disappearance from view was almost simultaneous with the collision. In a suit by the widow and minor children to recover damages for his death, *Held*, that as there was no proof of negligence on the part of the defendant, and as there was affirmative, uncontradicted and unimpeached testimony showing contributory negligence on the part of the deceased, the court should have given the jury binding instructions in favor of the defendant.

**ERROR** to the Court of Common Pleas of Berks County.

Case, by Eliza Ritchie and others, widow and minor children of William Ritchie, deceased, against the Reading and Columbia Railroad Company, to recover damages for the death of said William Ritchie, caused by the alleged negligence of defendant's servants. Plea, not guilty.



On the trial, before Sassaman, J., the evidence was substantially as follows:—On May 31st, 1878, the said William Ritchie was killed by a passing train, while attempting to cross the tracks of defendant company in a covered carriage. The place of the accident was a public crossing nine hundred and forty-six feet east of the Fritztown station and towards the city of Reading. This station is a flag station, i.e., one at which trains do not stop for freight or passengers unless especially signalled. West of the station is a deep cut beginning some three hundred to four hundred yards from the station and completely obscuring trains from view by its high embankments. At or near the crossing, upon which the accident occurred, there is also a shallow cut from ten to eleven feet deep. The nearest building to the crossing is three hundred yards distant. The village of Fritztown, the nearest aggregation of buildings, is a half a mile from the scene of the accident. The rules of the company required two long and two short whistles to be sounded, as a signal for road crossings. Engineers are also instructed not to run their trains faster than six miles an hour over certain specified crossings, but it appeared in evidence that this regulation did not apply to the crossing in question.

The train in question was running eastwardly from Lancaster to Reading at a rate of speed estimated at between twenty-five and thirty miles an hour. Before entering the deep cut, and about six hundred to eight hundred yards from the station, it made a prolonged whistle, and on emerging from the cut, where the station could be first seen, and perceiving no signal to stop, it blew two short additional whistles, as a signal to the brakesman to turn off the brakes. These alarms were heard by various witnesses, at distances from the station, varying from two hundred to six hundred yards, and by two others (Daniel Adams and Isaac Steffy) at a tool-house over one thousand feet beyond the place of the accident in the direction of Reading.

The road, upon which deceased was driving, descends to cross the railway track. It has embankments upon either side which shut out the view along the track until within twelve or fifteen feet from the rails, from which point the Fritztown station can be seen. On each side of the station are caution boards. The deceased was driving in a closed carriage on a rainy day. The only witness (George Freeman) who saw him immediately before the accident, testified as follows:

“ Q. Did you know William Ritchie? A. Yes, sir. Q. Did you see him on the 31st of May? A. Yes, sir; I saw him drive; I also saw him when he was dead. Q. Do you remember when the train struck him? A. No, sir; I could not see that; the wagon I could not see; the cars were higher than the wagon, and that is the reason I could not see the wagon when it was struck. Q. If you saw him drive down that road, state how he came down and

in what way he drove? *A.* He drove down in a walk. *Q.* How far from this crossing were you? *A.* Between five hundred and six hundred yards. *Q.* How is the ground there on your little place; is it higher or lower? *A.* It is pretty much higher; I can see the track from the street. *Q.* When he approached the railroad crossing did he stop his team, or did he go on? *A.* He did not stop it as far as I could see him. *Q.* Did you see him coming down the hill? *A.* Yes, sir. *Q.* Had you heard the train coming? *A.* Yes, sir. *Q.* Where was Ritchie when you first saw him? *A.* About one hundred yards from the railroad track. *Q.* Where was he when you last saw him? *A.* Against the cars; within fifteen or twenty feet; the cars were higher than his wagon, and I could not see the wagon. *Q.* Up to the time you last saw the wagon did he stop the team at all? *A.* When I did not see him any more, the not seeing him, and the crash of the accident, and the horse running away on the other side, was about one and the same moment. *Q.* But during the time that you saw him he did not stop? *A.* No, sir. *Q.* Did you hear the train whistle on that day? *A.* Yes, sir."

The train passed the station at the said rate of speed, struck the carriage at the crossing, and instantly killed its occupant.

The defendant presented the following points:

1. That the plaintiff having established that the train whistled in time to give warning to William Ritchie of the approach of the train to the crossing; if he failed for any cause to heed the warning, it was his own misfortune, and there is no evidence of negligence in the cause, and the verdict must be for the defendant.

*Answer.* We cannot affirm this point in this form. The facts in the case would be for the jury. (First assignment of error.)

2. That running at the rate of 25 or 30 miles an hour, as the train neared the crossing, which was an ordinary country road, was not negligence on the part of the defendant, nor evidence from which the jury can infer negligence.

*Answer.* Ordinarily this would be true, but the facts of every case must be taken into consideration, and what might be proper in one place would not be so in another. If the place is particularly dangerous, trains must be run more cautiously. (Second assignment of error.)

5. That under all the evidence in this case the verdict must be for defendant.

*Answer.* If the jury find that Ritchie was guilty of contributory negligence the verdict must be for the defendant. (Eighth assignment of error.)

The court charged, inter alia, as follows:

"Again, there is also no dispute as to the rules for running trains there. The rules for running the trains at that place are that they should not run by the cut of the South Mountain, and also

over the crossings faster than at the rate of six miles an hour. This is a matter of prudent regulation by the management of the railroad, and is founded upon theory and practice to be a correct method for conducting their business. As a matter of law it would amount to nothing. It is an important matter of fact to be taken into consideration by the jury in connection with other facts in disposing of the law upon the facts." (Third assignment of error.)

"Railroad trains by their agents, and also travellers—that is, persons crossing railroads—are bound to use greater care and caution at places that are particularly dangerous—such as running over crossings where the railroad and the public roads, or proper places of crossing, are in deep cuts, or where the railroads run around short curves, where there are high bluffs, and where consequently there is danger of collision or accident. Where such things may be anticipated, or where this would be likely to occur without using special caution, there ordinary care would require just that special caution which the ordinary care at such a place would induce; and what is ordinary care under one state of circumstances might not be ordinary care under state of circumstances. But the ordinary care to be exercised by a man, is just that care we have spoken of to you—the care which a man of ordinary intelligence and diligence would use under the circumstances, whether he ran a railroad train or whether he ran a one-horse shay. It would make no difference whether it was the man running the train, or the one crossing the railroad track. At this point it may be very properly said that railroad employees on trains, and the men who are travelling over the point of crossing are in lawful positions, and they must exercise such care—both of them—as we have already stated to you, and the care required of them is mutual, in order that collisions may be avoided. On the one hand a collision may be avoided by the exercise of proper care on the part of the man who crosses the track, so that the persons who are in the train may not be injured by the obstruction he may place upon it in his crossing; and on the other hand the railroad employees are to use that due and proper caution and care, which under the circumstances is required, so as not suddenly and unawares to run upon anybody that is crossing the track. Where there would be an absence of that care on the part of the railroad company—and we have said to you so far as we have gone that the presumption is in favor of the dead man—there a *prima facie* case would be made out for the plaintiff; and in a case like this there might be a recovery of damages, if the jury found that the presumption of ordinary care was sufficient in favor of the man who was killed. If you find the facts to be such as we have supposed them to be in the hypothetical case we argued upon before you, up to this time, taking the views and theories of the

plaintiff as correct, there would be damages; and if the jury find that there should be a recovery for the loss of such a life, it would be proper for the jury to find that there should be damages allowed, because the man had used all the care that was required of him, and the negligence of the occurrence was on the part of the railroad train, which ran faster than under the circumstances it should have run." (Fourth assignment of error.)

"If these whistles were sounded, it would rebut the idea of negligence on the part of the defendant to that extent. If the conformation of the ground, the topography of the immediate place and location would be such that the convolutions of sound in their vibration could be carried over his head, so that he could not be able to hear it from the place in which he was, and it would be carried to persons beyond that, who could hear it, might be no evidence that he heard it; but if he did not hear it, because he was negligent himself, having been in a closed wagon, having pulled up his coat-collar, or scarf, or whatever he might have worn that was in season—where such things were used over his ears, and he did not hear, for that reason, and he did not remove the obstruction, if in his control, so that he could hear, he would be negligent already; or if a train would sound a whistle, and having sounded a whistle would nevertheless run at an entirely unusual rate of speed for the place where they passed, whereby such a person had been misled—if the train did not do that, then the fact of its having sounded a whistle and of its having run at only ordinary rate of speed, would be relief from responsibility; but if it ran at a greater rate of speed than would be usual, ordinary and proper at such a place, taking all things into consideration, then the case might be different. Or, if by some of the accidents which occur in life, for which we cannot account—although they often occur—this man should have got on the track, and the engineer, who was in control of the train, should have seen his horse or vehicle on the track, and he should have run on headlong without stopping, when he saw the man, having no opportunity to get out of the way, being in a dangerous situation, or even if in a situation where the danger was so great as to lose his presence of mind, the defendant would not be released from paying damages." (Fifth assignment of error.)

Verdict for the plaintiffs for \$5,000, and judgment thereon. The defendant thereupon took this writ of error, assigning for error the action of the court in answering its first, second, and fifth points, the portions of the charge above quoted and generally that "the charge, as a whole, is verbose, confused and unintelligible, instead of being a plain, concise and practical statement of the law applicable to the facts of the case. Its tendency was to mislead and confuse the jury." (Seventh assignment of error.)

Jeff. Snyder and George F. Baer for the plaintiff in error.

James N. Ermentrout (Daniel Ermentrout and Henry C. G. Reber with him) for defendant in error.

GREEN, J.—It is difficult to understand upon what theory of the testimony, the verdict in this case was rendered by the jury, or permitted by the court. There was no proof of negligence by the defendant, and there was affirmative, uncontradicted, and unimpeached testimony showing contributory negligence on the part of the deceased. Four of the plaintiff's witnesses, being all who were in the vicinity at the time of the accident, to wit: James Sell, Charles H. Miller, Daniel Leininger and Daniel Adams, testified that three whistles were blown, one long and two short, by the approaching engine, before it reached the crossing, and they were all heard by all of the witnesses. Three of these witnesses were at or near the Fritztown station, and one Daniel Adams was at the tool house along the railroad, about two hundred to three hundred yards beyond the crossing at which the accident occurred. The train was going east from Lancaster to Reading; the place of the accident was a public road crossing, situate about nine hundred and fifty feet east, or towards Reading, from the Fritztown station. The first or long whistle was blown just above a bend in the road, before reaching the Fritztown station, and the second and third were blown after turning the bend and coming within sight of a signal board at the station to denote whether the train should stop for passengers. In addition to the foregoing, another witness, Isaac Steffy, testified that he was at the tool house with Daniel Adams when the accident happened, and heard the whistle of the approaching train. He also said he had measured the distance from the crossing to the tool house and it was one thousand and thirty-four feet, so that it was an undisputed fact that notice of the approach of the train was given, in the usual way, by the sound of a steam whistle, which was loud enough to be heard a considerable distance beyond the place of the accident.

Another witness for the defendant, George Freeman, living between five hundred and six hundred yards from the Fritztown station also heard the whistle. Four witnesses for the plaintiffs, and two for the defendant concur in their testimony that the alarm was given, and at a sufficient time before the crossing was reached, to enable a person approaching the railroad along the public road to abstain from an attempt to cross. Two witnesses, one for the plaintiff, and one for the defendant, testify that they heard the alarm at a point several hundred yards beyond the crossing. There is no opposing or contradictory testimony in the case. Facts thus established cannot be spoken of by the court or considered by the jury as disputed or controverted facts. They are entirely undisputed, proved by both sides and denied by neither. Hence the learned judge of the court below was clearly and gravely in error

in leaving the question whether the whistles were sounded, to the jury, as an open and undetermined question to be decided by them, as was done in the portion of the charge covered by the fifth assignment. This error was seriously enhanced by the subsequent language of the same assignment, in which the court told the jury that although the sound of the whistles was heard by persons beyond the place of the accident, it might be no evidence that it was heard by the person injured. Again in the same assignment the learned court propounded the case of an engineer wilfully rushing upon a man whom he saw on the track before him, making no effort to stop, when he knew the man could not escape in time, as a possible answer to the proof of notice by the whistles. As there was not a particle of proof of any such state of facts in this case, such a line of remark was entirely unwarranted, and was error of the gravest character. It could only serve the purpose of misleading the jury. Upon the entirely undisputed testimony it was the clear duty of the court below to charge the jury that the defendant was not guilty of negligence so far as giving notice of the approach of the train was concerned.

The only other possible basis for a charge of negligence to rest upon was the speed of the train, but here also there is an entire absence of testimony to support the charge. The train was going at the rate of twenty-five to thirty miles an hour, according to the testimony of the witnesses who spoke upon that subject. Had it been running at that rate through the streets of a town or village the question of negligence in this respect could well have been left to the jury who would no doubt have determined it against the company. But there was neither town nor village, nor any aggregation of houses, at the place of this crossing. The village of Fritztown was half a mile distant. John Sell, one of the plaintiff's witnesses, said the nearest house to the crossing was one hundred to two hundred yards away, and that the next nearest houses were two, which were three hundred yards off. He also said there was no village either at the crossing or at the Fritztown station. There was a short and shallow cut about ten or eleven feet deep at and near the crossing, on the railroad and on the public road. The railroad extended from the crossing to the station in a straight line so that a person standing on the track or within twelve or fifteen feet of the track at the crossing could see the road all the way to the station. In such circumstances it cannot be considered that a speed of twenty-five to thirty miles an hour is any evidence of negligence. The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight. It is authorized by law, and a railroad company in propelling its trains at high speed along its tracks in the open country is simply engaged in the lawful exercise of its franchise. If it is evidence of negligence that a train is run at this rate of speed, it must be



because running at a less rate is a legal duty, but there is no such duty established either by statute or decision. While there may, of course, be circumstances which require a diminished speed, it is only the force of those circumstances which creates such a duty. None of them are here present. This train was running through the open country, in its accustomed course, in the exercise of the lawful powers of the company, with no dwellings or other building in immediate proximity, neither through nor over any municipal streets, and in observance of the law requiring signals of its approach. In such circumstances we fail to discover any evidence of negligence in the mere fact that the rate of speed was twenty-five to thirty miles an hour.

In addition to the foregoing consideration there was affirmative and uncontradicted evidence showing that the deceased was guilty of contributory negligence. But one witness saw him approach the track. He saw the deceased first on the public road at a distance of about 100 yards from the railroad moving directly towards the track and proceeding, without stopping until the moment of the accident, when he could no longer see him on account of the cars being higher than the wagon. He was asked. *Q.* Up to the time you last saw the wagon, did he stop the team at all? *A.* When I did not see him any more the not seeing him, and the crash of the accident, and the horse running away on the other side was about one and the same moment. *Q.* But during the time you saw him he did not stop? *A.* No, sir.

There was not a particle of testimony in contradiction of this, and the mere fact of the accident was so strongly in corroboration of it, that it is impossible to believe that the deceased performed his legal duty of stopping, looking both ways and listening for approaching trains before going upon the track. The presumption that he did, was overcome by the opposite proof. The court should have instructed the jury in plain and simple words that if they believed the witness, the deceased was guilty of contributory negligence and their verdict should be for the defendant. In *Pennsylvania R. R. Co. v. Beale*, on p. 509, we said: "But the fact of collision shows the necessity there was of stopping, and therefore in every case of collision the rule must be an unbending one.".... "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se* and a question for the court." In *Pennsylvania R. R. Co. v. Weber*, 26 P. F. S. on p. 168, Mr. Justice Williams, delivering the opinion of the court, said: "If, as suggested in the point, the uncontradicted evidence in the case shows that the decedent did not stop before driving on the track, then he omitted a plain and positive duty, and the court should have declared its omission negligence as a matter of law. But if there was no di-

rect and positive evidence showing that he did not stop before driving on the track, then the learned judge was clearly right in refusing to withdraw the case from the jury and in saying as he did; 'We cannot affirm this point, but say again, that the first presumption of law is that he did stop, look and listen. But this presumption will give way to the actual truth that he did not do so.' " Of course, where there is no direct testimony on the subject the presumption is sufficient and will prevail. But where there is affirmative, direct and credible testimony that the person injured went upon the track without stopping to look and listen, the presumption is rebutted and displaced.

The learned court was also in error in saying that the rules of the company required that trains should not be run over crossings faster than at the rate of six miles an hour. That restriction applied to certain specified cuts, but not to crossings generally, and the remark would naturally tend to mislead the jury.

We think also that the seventh assignment is sustained. It must be confessed that it is not easy to understand the precise meaning of the charge, and there is in some portions of it a liability to conflicting interpretations which might confuse the mind of the ordinary juror. Upon the whole case we are clearly of opinion that the fifth point of the defendant should have been affirmed and a verdict for the defendant directed.

Judgment reversed.

**Speed of Trains must be Slackened on Approaching Highway Crossings.**—A railroad company is bound so to run its trains that they will not approach highway crossings at an unreasonable rate of speed. *Wilds v. Hudson River R. Co.*, 29 N. Y. 815; *Warner v. New York, etc., R. Co.*, 44 N. Y. 465; *Massoth v. Delaware, etc., Canal Co.*, 64 N. Y. 524; *Artz v. Chicago, etc., R. Co.*, 44 Iowa, 284; *Black v. Burlington, etc., R. Co.* 38 Iowa, 515; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Chicago, etc., R. Co. v. Payne*, 59 Ill. 534; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313; *Thomas v. Delaware, etc., R. Co.*, 2 Am. & Eng. R. R. Cas. 643; *Indianapolis, etc., R. Co. v. McLin*, 8 Am. & Eng. R. R. Cas. 237; *Pittsburgh, etc., R. Co. v. Martin*, 8 Am. & Eng. R. R. Cas. 253; *Salter v. Utica & B. R. Co.*, 8 Am. & Eng. R. R. Cas. 437; *Louisville & N. R. Co. v. Milam, Ex'r.*, 13 Am. & Eng. R. R. Cas. 507; *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. R. Cas. 670; *Lake Erie & W. R. Co. v. Zoffinger*, 15 Am. & Eng. R. R. Cas. 370.

**What is Reasonable and Unreasonable Rate of Speed.**—As to what is and what is not considered unreasonable speed in a train approaching a crossing, see *Massoth v. Delaware & H. C. Co.*, 64 N. Y. 524; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Frick v. St. Louis, etc., R. Co.*, 8 Am. & Eng. R. R. Cas. 280; *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 460; *Tully v. Fitchburg R. Co.*, 14 Am. & Eng. R. R. Cas. 682.

**No Rate of Speed Negligence per se.**—But no conceivable rate of speed will amount to negligence *per se*. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 376; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88; *Cohen v. Eureka & P. R. Co.*, 14 Nev. 376; *McConkey v. Chicago, B. & Q. R. Co.*, 40 Iowa, 205; *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537; *Grows v. Maine Central R. Co.*, 67 Me. 100; *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375; *Zeigler v. Northeastern R. Co.*, 5

S. C. 222; s. c., 7 S. C. 402; Telfer v. Northern R. Co., 1 Vroom (N. J.), 188; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Terre Haute, etc., R. Co. v. Clark, 6 Am. & Eng. R. R. Cas. 84; Powell v. Missouri Pac. R. Co., 8 Am. & Eng. R. R. Cas. 467.

**Nonsuits on the Ground of Contributory Negligence.**—Whenever the facts of a negligence case are undisputed, and it appears clearly that the party injured has been guilty of contributory negligence, it is the right and duty of the court to take the case from the jury and to give binding instructions to find for the defendant or award a nonsuit. Pittsburgh, etc., R. Co. v. Evans, 53 Pa. St. 250; Dublin, etc., R. Co. v. Slattery, L. R. 3 App. Cas. 1155; Dascomb v. Buffalo, etc., R. Co., 27 Barb. 221; Railroad Co v. Stout, 17 Wall. 657; Detroit, etc., R. Co. v. Van Steinburg, 17 Mich. 99; Pennsylvania R. Co. v. Richter, 2 Am. & Eng. R. R. Cas. 220; Johnson v. Chicago & N. Y. R. Co., 8 Am. & Eng. R. R. Cas. 471. The courts in Pennsylvania are particularly prone to grant nonsuits. See, for remarks upon this subject Smith v. Hestonville, M. & F. R. Co., 2 Am. & Eng. R. R. Cas. 12.

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## BOHAN

v.

MILWAUKEE, L. S. AND W. RY. CO.

(61 Wisconsin Reports, 391.)

Plaintiff was injured while attempting to cross the railroad track in the night-time, in front of three gravel-cars which were being lawfully pushed in front of a locomotive. The cars were moving at a reasonable and lawful rate of speed; the head-light of the engine was in proper condition and lighted; a brakeman was upon the extreme front of the train with a lighted lantern; and the engine-bell had been rung constantly while the train was passing from a point more than 230 feet distant to the place of the injury. *Held*, that the railroad company was not guilty of any negligence which caused the injury.

The conductor, engineer, fireman, and brakeman having testified that the brakeman stood on the forward end of the train with a lighted lantern, and that the bell was ringing as above stated, the testimony of the plaintiff and several other witnesses who looked only casually at the train, that they did not hear the bell or see the lantern, is *held* to be at most a mere scintilla of evidence, and not to have justified the submission of those questions to the jury, or to have warranted a special finding that no one stood on the forward end of the train with a lantern.

APPEAL from circuit court, Ozaukee county.

G. W. Foster for respondent.

Alfred L. Cary for appellant.

LYON, J.—This case was here on a former appeal, and is reported in 58 Wis. 30; s. c., 15 Am. & Eng. R. R. Cas. 374. The nature of the action and the facts of the case are there sufficiently stated, and will not be repeated here. The case has been again tried, and the trial resulted in a judgment for the plaintiff, from

which the defendant has appealed. The testimony on the part of the plaintiff on the last trial is substantially the same as that introduced by him on the first. By reference to the report of the case in 58 Wis. 30; s. c., 15 Am. & Eng. R. R. Cas. 374, it will be seen that the defendant introduced no testimony on the first trial. The grounds upon which the judgment went on the first appeal will appear by the following extract from the opinion: "It is not unlawful for railway companies to propel cars by pushing them in advance of the locomotive by which they are propelled, when the exigencies of their business require it to be done. If they do so under circumstances which increase the risks of injury to persons or property, the law places them under obligation to give timely and suitable notice or warning, in some manner, of what they are doing. In this case, it does not appear that the gravel-cars could be distinguished or their presence discovered by persons at the street-crossing, when the plaintiff attempted to cross the track, unless by aid of the head-light. If, therefore, the head-light did not disclose to persons at that point, using proper care and watchfulness, that the locomotive was preceded by the gravel-cars, the defendant company was negligent in not furnishing some other and more effectual signal or notice of the fact. Hence the case seems to turn upon the question of the sufficiency of the head-light to enable the plaintiff to discover the gravel-cars by exercising due care and scrutiny. If it was sufficient, the plaintiff was negligent, and the defendant was not. If it was not sufficient, the result is reversed—the defendant was negligent, and the plaintiff was not." It was held that, under the circumstances of the case, the question whether or not the head-light was sufficient to enable the plaintiff, exercising proper care, to see the gravel-cars, was for the jury. There was no proof, on the first trial, that a lighted lantern was held on the forward end of the first gravel-car from the depot, or that the train bell was rung immediately before the plaintiff was injured. On the last trial, four witnesses, produced on behalf of the defendant, each testified that a brakeman stood upon the forward end of that car with a lighted lantern in his hand, plainly visible, from the time they left the gravel-pit (nearly one-half mile south of the depot) until the train reached the depot. These witnesses were the conductor, engineer, and fireman on the train which injured the plaintiff, and the brakeman who held the lantern. There is a switch 230 feet south of the depot, and three of these witnesses testified that the engine-bell was rung constantly while the train was passing from a point several rods south of this switch to the depot. The plaintiff and several witnesses introduced by him each testified that he saw the head-light of the approaching train when a short distance south of the depot platform, but saw no person on the forward end of the first gravel-car, nor any light at that place, and that he does not remember to have heard the engine-bell

ring before the plaintiff was injured. This is all the testimony which in any manner tends to throw doubt upon the statements of the defendant's witnesses as to the ringing of the bell, or the presence of a lighted lantern on the gravel-car.

It satisfactorily appears from all the evidence that at the time the plaintiff was injured, and immediately before, the train was running at a reasonable and lawful rate of speed, and that it was equipped with a proper head-light. It was held on the former appeal, and is *res adjudicata* on this appeal, that it was not unlawful for the defendant to propel its gravel-cars in front of the locomotive, if that was required by the exigencies of its business. That it was so required in this case is abundantly and conclusively proved. The defendant was only required to give timely and suitable notice or warning that it was so propelling the gravel-cars. We do not perceive what notice or warning, besides that furnished by the head light, the defendant could reasonably be required to give, other than to ring the engine-bell and to keep a man with a lighted lantern stationed at the head of the train. The question to be here determined is, does the testimony conclusively establish that such warnings were given in the present case?

The testimony of the plaintiff's witnesses, that they did not hear the bell ring, or did not see the lighted lantern at the head of the gravel-cars, is purely negative, and its negative character is intensified by the fact, which is made perfectly obvious by their testimony, that they did not look attentively, but only casually, at the approaching train, and the attention of none of them was directed to the presence or absence of such warnings. Upon this record the credibility of the defendant's witnesses, who testified positively to the ringing of the bell and the presence of the brakeman on the gravel-car with a lighted lantern, stands unimpeached. The jury were not at liberty to disregard their testimony, but it was their duty to reconcile the testimony of all the witnesses, if that could reasonably be done. There is no difficulty in doing so in this case. The testimony of the defendant's witnesses is positive that the bell was seasonably rung, and that the brakeman stood on the forward end of the leading gravel-car holding a lighted lantern; and that of the plaintiff's witnesses is that, although they had the opportunity to hear and see such warnings, they failed to do so. The testimony does not tend to show a single fact or circumstance which gives a positive character to the testimony of the plaintiff and his witnesses. Such being the nature of the testimony, the fact that the warnings were given was established, if not by the undisputed evidence, certainly by an overwhelming preponderance of testimony, and the jury were not justified in finding that they were not given. Indeed, the negative testimony of plaintiff and his witnesses, while it has some bearing upon the question of the warnings, amounts to little more than, so to speak, a mere scintilla

of evidence, and did not justify the jury in their disregard of all the positive and otherwise unimpeached testimony that the warnings were given. See *Muster v. Railway Co.*, ante, 223.

This court always has been and is very careful not to interfere with findings of facts by juries unless absolutely compelled by the law to do so. But we find one fact in this record which causes us to feel less tender of this verdict. The jury assessed the plaintiff's damages at \$2500,—a sum which, in view of the nature and extent of the plaintiff's injuries, was greatly in excess of what he ought to have recovered, if entitled to recover at all. The learned circuit judge was of that opinion, and only denied a motion for a new trial on condition that the plaintiff remit one-half of the damages so assessed. The findings of a jury who could render such a verdict are not entitled to any special consideration at the hands of the court. Indeed, the damages awarded were so excessive, probably, it ought to be held that the assessment shows such bias, prejudice, or passion on the part of the jury, that the judgment ought to be reversed for that reason; because when the plaintiff was injured, the train of the defendant was moving at a lawful rate of speed, and was lawfully propelling the gravel-cars in front of the locomotive; because the head-light of the train was in proper condition and lighted; and because sufficient and timely warning of the approach of the train was given by the ringing of the bell, and by the presence of the brakeman with a lighted lantern on the extreme front of the train, it must be held that the defendant was not guilty of any negligence which caused the injuries complained of. The jury found specially that as the train approached, none of the defendant's men stood on the forward end of the forward gravel-car, and based their finding that the defendant was guilty of negligence upon the fact alone that the front gravel-car was not lighted. It follows from what has already been said that the evidence does not support these findings. At the close of the testimony the defendant moved for a nonsuit. The motion was denied. It should have been granted. Not having been granted, the circuit court should have granted the motion of the defendant for a new trial.

The foregoing views are decisive of the case; hence it becomes unnecessary to consider the question of the alleged contributory negligence of the plaintiff. Judgment reversed, and cause remanded for a new trial.

**Backing and Pushing Cars.**—As to the measure of care required on the part of a railroad company backing or pushing cars at a crossing, see *Hutchinson v. St. Paul, M. & M. R. Co.*, and note *infra*.



HUTCHINSON, by Guardian ad litem,

v.

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. October 18, 1884.*)

In an action to recover damages for injuries from a collision at a railway crossing with the wagon in which plaintiff was riding, her evidence tended to show that the team was driven with care, and that plaintiff and the driver were watching the road, and looking and listening for indications of danger as they approached the crossing; that they heard no signal, and had no warning of the approach of an engine from the west, but were unexpectedly overtaken by a switch-engine from that direction, running backwards down grade at a high rate of speed, with steam shut off, and without signals of its approach, which they did not discover till too late to avoid a collision. They were going east, the railroad being on their left and approaching the street at a sharp angle, and above there was a cut which partially obscured the vision, terminating about 200 feet from the crossing. The evidence also showed that they had previously looked several times up the road in that direction, the last time when at a point from 50 to 70 feet from the crossing, and in the interval of about 10 seconds they were listening for signals or indications of a coming train, their attention being also arrested by the presence of another switch-engine standing below the crossing apparently ready to move. *Held*, that whether the plaintiff was in the exercise of that degree of care which persons of ordinary prudence and intelligence would exercise in a similar situation depended upon the consideration of a variety of circumstances and inferences of fact, which were proper for the judgment of a jury, and that the case was properly submitted to them.

APPEAL from an order of the district court, Otter Tail County.

Tyler & Lewis and Brown & Haupt, for respondent, Esther Hutchinson.

R. B. Galusha, for appellant, St. Paul, M. & M. Ry. Co.

VANDERBURGH, J.—That there is abundant evidence in the case tending to show negligence on the part of the defendant's servants in running the engine which came into collision with the vehicle in which plaintiff was riding, and caused the injury complained of, is not questioned. The defendant's chief contention is that the evidence also conclusively establishes contributory negligence on the part of the plaintiff. Whether the case should have been withdrawn from the jury for this cause is therefore the principal question for our consideration.

The accident occurred at the intersection of Summit Avenue with the defendant's railroad track, in the city of Fergus Falls. The road runs southeasterly through that portion of the city, on a descending grade of 35 to 37 feet per mile, having a single track, and crossing Union Avenue, Court Street, Summit Avenue, and Mill

Street diagonally, substantially as shown by the diagram exhibited, and a portion of the way also running through a cut, which extends above Union Avenue, where the track is bridged, down to within 50 feet of the centre of Court Street and about 200 feet from the place of the accident. Above Court Street the ground rises and the cut deepens, the banks rising in some places to a height of 20 feet above the track. The wagon was driven by one Shuster, who had been employed to convey plaintiff, a young girl of 15 years, into the city. They entered the city by way of Court Street, going north directly towards the railroad, of the line of which, except as obscured by the banks of the cut, they had an extended view; and the evidence shows that while approaching Summit Avenue, which is crossed by Court Street, they both looked and listened for the cars from the west. Turning east into Summit Avenue, at about 100 feet from the crossing, they repeated the same precautions, and also, after advancing from 30 to 50 feet further towards the crossing,—the railroad being on their left, and intersecting the street at a sharp angle,—they again turned and looked up the road as far as Union Avenue bridge, where they saw school children on the bridge, but neither saw nor heard any indications of cars or engine. They had previously observed a switch-engine with steam up standing on the track below Mill Street, which is parallel to and next east of Court Street. It was, in fact, on a side-track, but this they did not then know. Subsequent accurate measurements show that at a distance of 105 feet from the crossing the smoke-stack and cab of an engine could have been seen a distance of 320 feet, and 900 feet at a point 70 feet from the crossing. The parties did not again look westerly up the track (though listening for signals) till the horses reached the platform of the crossing,—a period of about 10 seconds,—when plaintiff suddenly discovered an engine from that direction moving rapidly upon them, without warning or noise indicating its approach, and too late to prevent a collision. They testify that they had in the mean time been watching the engine in sight below them, and plaintiff's evidence also shows that the engine which caused the accident was also a switch-engine; that it was running backwards down grade, with steam shut off, at from 20 to 25 miles an hour; and that the men in charge of it neglected to give signals of any kind of its approach, or to keep a lookout for danger at the crossings.

At whatever rate of speed it may have been moving, the engine was, doubtless, somewhere in the cut when the plaintiff last looked in that direction before reaching the crossing. But plaintiff and Shuster both deny that they saw it, and insist that they looked that way and continually listened for indications of danger. They were not bound to exercise extreme diligence, but such diligence as persons of common prudence and intelligence would exercise under the circumstances, and they were not required to measure time

and distance with exactness as they approached the crossing; and it does not necessarily follow because, upon a subsequent measurement by an experienced engineer, it is discovered that an engine could be seen a given distance at different points in the street as they neared the track, that the plaintiff was negligent in not observing it under all the circumstances. *Massoth v. D. & H. C. Co.*, 64 N. Y. 530.

The evidence tends to show that the plaintiff and the driver were constantly mindful that they were approaching a place of danger, and were regulating their conduct with reference to that fact, and, under the circumstances, it was a fair inference of fact for the jury that they were surprised by the sudden appearance of the engine, and that, after their observation in that direction, they had no reason to expect the presence of another switch-engine at that place, without signals, which, if duly made, considering the proximity of the road on their left, might have been heard in time to have prevented the accident. In considering what ordinary prudence would require of the plaintiff, under such circumstances, regard must be had to the nature of the danger to be apprehended, and the reasonable probability of incurring it, and also the natural presumption that the defendant would discharge its duty, and act with due care. She could not be charged with negligence in not anticipating some particular negligent act of the defendant, or, as in this instance, if her evidence is true, its culpable negligence in so running an engine at a high rate of speed, without warning, in a city where crossings are numerous and much travelled. Nevertheless, she would not, on this account, be entitled to omit the reasonable precautions dictated by prudence, approaching a known place of danger. It is apparent, however, that the question of plaintiff's contributory negligence in the premises depends upon the consideration of a variety of circumstances, and upon inferences of fact which render the case one proper for the judgment of a jury; and for substantially the same reasons that controlled the decision of this court in *Louck v. Railroad Co.*, 31 Minn. 530, we think this case was properly submitted to the jury. *French v. Railroad*, 116 Mass. 540; *Chaffee v. Railroad Corp.*, 104 Mass. 116; *Stackus v. Railroad Co.*, 79 N. Y. 467; *Ochsenbein v. Shapley*, 85 N. Y. 224; *Baldwin v. Railroad Co.*, 15 Am. & Eng. R. R. Cas. 166; *Butler v. Railroad Co.*, 28 Wis. 504; *Gaynor v. Railway Co.*, 100 Mass. 212.

Exceptions were taken by defendant's counsel to certain instructions given by the court, to the effect that the failure to ring the bell or sound the whistle, and to keep a lookout for the crossings, if so the jury found the fact to be, was evidence of negligence, as it also was to run the engine at a dangerous rate of speed. Under the circumstances, these exceptions were properly overruled, both because such evidence was proper to establish defendant's negli-

gence, and also as bearing upon the question of plaintiff's conduct in the premises. Plaintiff, in the discharge of her own duty to proceed with caution, and exercise due diligence to avoid danger, was, as we have before observed, entitled at the same time to expect the exercise of like reasonable care, and not culpable negligence, on the part of the defendant. *Loucks v. Railroad Co.*, *supra*; *Continental Co. v. Stead*, 95 U. S. 161; *Gaynor v. Railway Co.*, 100 Mass. 213; *Wylde v. Railroad Co.*, 53 N. Y. 161; *Eppendorf v. Railroad Co.*, 69 N. Y. 197; *Owen v. Railroad Co.*, 35 N. Y. 518; *Shear. & R. Neg.*, § 31.

Order affirmed.

**Backing and Pushing Cars.**—A railroad company is required to take extraordinary care to prevent accident when it undertakes to back a train or engine at a highway crossing. *Shaw v. Boston, etc., R. Co.*, 8 Gray, 45; *Bradley v. Boston, etc., R. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 Cush. 564; *Bailey v. New Haven, etc., R. Co.*, 107 Mass. 496; *Grippen v. New York, etc., R. Co.*, 40 N. Y. 34; *Eaton v. Erie R. Co.*, 51 N. Y. 544; *Maginnis v. New York, etc., R. Co.*, 52 N. Y. 215; *McGovern v. New York, etc., R. Co.*, 67 N. Y. 417; *Chicago, etc., R. Co. v. Garvey*, 58 Ill. 85; *Illinois, etc., R. Co. v. Ebert*, 74 Ill. 399; *Hathaway v. Toledo, etc., R. Co.*, 46 Ind. 25; *Kennedy v. Northern Mo. R. Co.*, 36 Mo. 351; *Leavenworth, etc., R. Co. v. Rice*, 10 Kans. 426; *Barry v. New York Central & H. R. R. Co.*, 18 Am. & Eng. R. R. Cas. 615; *Lake Erie & W. R. Co. v. Zoffinger*, 15 Am. & Eng. R. R. Cas. 371; *Bohan v. Milwaukee, etc., R. Co.*, 15 Am. & Eng. R. R. Cas. 374; *Hogan v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. R. Cas. 439; *Johnson v. St. Paul & D. R. Co.*, 15 Am. & Eng. R. R. Cas. 467; *Leroy v. Midland R. Co.*, 15 Am. & Eng. R. R. Cas. 478.

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## HOWARD

*v.*

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. June 12, 1884.*)

When the rate of speed at which a railroad car is run across a street is shown, it is for the jury to say whether, with regard to the safety of the public, that rate was reasonable.

When the mode of running cars by "kicking,"—that is by giving them an impetus with an engine, and then detaching them to let the impetus take them to the point of destination,—and the situation of the tracks, has been explained to the jury, it is for them to say whether there is any just as proper and convenient and less dangerous mode of running them across a street.

Evidence on the point of contributory negligence *held* to make a case for the jury.

**APPEAL** from an order of the district court, Hennepin County, refusing defendant's motion for new trial.

H. C. Truesdall and Wilson & Lawrence for respondent.  
Benton & Roberts for appellant.

GILFILLAN, C. J.—There is no inconsistency between the general verdict and the special findings of fact. When the manner of running the cars across the street by “kicking,” and the situation of the tracks, had been explained to the jury, and the rate of speed at which they were run across, shown, together with the character of the night as to darkness, and of the street as to the extent to which it was travelled, it was peculiarly the province of the jury to determine whether the rate of speed was reasonable, and whether “kicking” the cars—that is, giving them an impetus sufficient to carry them to the desired point—is a more dangerous mode of running them across a street than running them across with the engine, and whether it is any more convenient. No one can be so ignorant of the operating of railroads as not to know that the engine can run across at a snail’s pace, while “kicking” must require considerable speed to be given at the start to carry the cars to the point of destination. It was proper to submit the questions to the jury, though there was no expert testimony, for the matters came within the common sense and common observation of the jury.

The question of plaintiff’s contributory negligence was clearly for the jury. Of course, in approaching a railroad crossing to cross it, a man must make use of his sight and hearing to ascertain if it is safe to cross. But if, upon diligently using them, he does not learn of approaching danger, it cannot be negligence to make the crossing. Plaintiff swears that he both looked and listened, and neither saw nor heard the approaching cars till too late to escape. His companion, Otto Kirst, swears that he too looked and listened, and did not see nor hear the cars. And that their testimony was not entirely improbable, was apparent from the testimony of the policemen Daly and Brady. If the jury were satisfied—and from the evidence they might have been—that the plaintiff looked and listened when he was about 14 feet from the track, and saw and heard nothing, it was for them to determine whether, under the circumstances, it was negligent in him to assume that he could walk that distance without danger.

Order affirmed.

**No Rate of Speed Negligence per se.**—As a rule, whether or not a certain given rate of speed is or is not negligence, is for the jury. No rate of speed is negligence per se. *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 67; *Edson v. Central R. Co.*, 40 Iowa, 47; *McKonkey v. Chicago, etc., R. Co.*, 40 Iowa, 205; *Latty v. Burlington, etc., R. Co.*, 38 Iowa, 250; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Toledo, etc., R. Co. v. Barlow*, 71 Ill. 640; *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397; *Burton v. Philadelphia, etc., R. Co.*, 4 Harv. (Del.) 252; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 574; *Pacific R. Co. v. Houto*, 12 Kans. 328; *Terre Haute, etc., R. Co. v. Clark*, 6 Am. & Eng. R. R. Cas. 84;

Powell v. Missouri Pac. R. Co., 8 Am. & Eng. R. R. Cas. 467; Goodwin v. Chicago, R. I. & P. R. Co., 11 Am. & Eng. R. R. Cas. 460; Louisville & N. R. Co. v. Milam, 13 Am. & Eng. R. R. Cas. 507.

But see contra, Railroad Co. v. Lyon, 7 Rep. 556; Reeves v. Delaware, etc., R. Co., 30 Pa. St. 454.

**Pushing or Backing Cars at Crossings.**—In pushing or backing cars at railroad crossings the company is bound to use extraordinary care to prevent accidents by sounding suitable signals and giving other fit precautions. Kansas Pacific R. R. Co. v. Proctor, 14 Kans. 37; Bailey v. New Haven, etc., R. Co., 107 Mass. 496; Robinson v. Western Pac. R. Co., 48 Cal. 409; Kennedy v. Northern Missouri R. R. Co., 36 Mo. 351; Hathaway v. Toledo, etc., R. R. Co., 46 Md. 25; Leavenworth, etc., R. R. Co. v. Rice, 10 Kans. 426; McWilliams v. Detroit Central R. Co., 31 Mich. 247; Hogan v. Chicago, M. & St. P. R. Co., 15 Am. & Eng. R. R. Cas. 439; Bohan v. Milwaukee, L. S. & W. R. Co., 15 Am. & Eng. R. R. Cas. 374.

**Signal on Pushing or Backing Cars at Crossing.**—The mere sounding of a whistle on an engine attached to a long train of freight cars is not sufficient warning of an intention to back the train at a crossing. Eaton v. Erie R. R. Co., 51 N. Y. 544; Maginnis v. New York, etc., R. R. Co., 52 N. Y. 215; McGovern v. New York, etc., R. R. Co., 67 N. Y. 417; Chicago, etc., R. R. Co. v. Garvey, 58 Ill. 85; Illinois, etc., R. Co. v. Ebert, 74 Ill. 399; Linfield v. Old Colony R. Co., 10 Cush. 564.

**Flying Switch.**—The use of the flying switch, which seems to be of about the same dangerous tendency as the act complained of in the principal case, has been frequently held to amount to negligence per se. French v. Taunton, etc., R. Co., 116 Mass. 537; Hinckley v. Cape Cod R. Co., 120 Mass. 257; Brown v. New York, etc., R. R. Co., 32 N. Y. 597; Sutton v. New York, etc., R. Co., 66 N. Y. 243; Butler v. Milwaukee, etc., R. R. Co., 28 Wisc. 487; Illinois Central R. Co. v. Baches, 55 Ill. 397; Chicago, etc., R. Co. v. Garvey, 58 Ill. 83; Illinois, etc., R. Co. v. Hammer, 72 Ill. 847; Philadelphia & R. R. Co. v. Troutman, 6 Am. & Eng. R. R. Cas. 117.

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## FERGUSON

v.

WISCONSIN CENTRAL R. Co. et al.

(*Advance Case, Wisconsin. April 28, 1885.*)

Plaintiff, who had no knowledge that a running switch was being made, came out of a store near the railroad, and after waiting for the engine to pass attempted to cross the track, and was run over by a detached car which he did not and could not see, because he was enveloped by the smoke and steam from the engine. *Held*, that it could not be said, as matter of law, that he was guilty of contributory negligence, and that the question was properly submitted to the jury to determine under all the circumstances of the case.

It is the duty of a railroad company, when making a running switch at a point where the track crosses public business streets in populous villages and towns, to use the utmost care to avoid accidents; and whether it has been guilty of negligence is a question for the jury, to be determined on consideration of all the facts and circumstances in each case.



When a railroad company owns a railroad in operation, bearing the name of the company, and which, presumably, the company constructed, the presumption is that such company operates it, and in order to relieve itself from liability for injuries to persons upon such road, caused by the negligence of the employees operating the same, the burden of proof is upon it to show that it does not operate the same, and in the absence of evidence on that point it will be held liable.

A verdict for \$8000 damages *held* not excessive, and a new trial refused.

APPEAL from circuit court, Waupaca County.

This action was brought to recover damages for personal injuries sustained by the plaintiff, who was struck by a moving car on the Wisconsin Central R. R., at the village of Spencer, on September 26, 1881. The defendant Stewart was not served with process, and made no appearance to the action. The complaint alleges that at the time the plaintiff was injured the railroad was being operated by the defendant company, and by the defendants Abbott and Stewart, as trustees thereof, and that the injury was caused by the negligence of the defendants' employees operating the car and railroad at that point. It also alleges that the plaintiff was injured without fault or negligence on his part, and states the circumstances under which the injury occurred. The defendant Abbott answered separately, alleging that he and his co-trustee (Stewart) had, at the time the plaintiff was injured, the sole and exclusive possession and control of such railroad, and denying that the defendant company was concerned in the operation thereof. The defendant company also answered, denying that it had any control over or any connection with the operation or management of such railroad when the plaintiff was injured.

The testimony introduced on the trial tends to show the following state of facts: The village of Spencer contains about 800 inhabitants, and the railroad passes through it in a northerly and southerly direction, crossing Clark Street, which is the principal business street of the village. The depot is located about 40 rods south of Clark Street. At the depot there is a side track near the main track, and connecting with it at the south end by a switch located  $18\frac{1}{2}$  feet south of the south side of Clark Street. About 300 yards north of this switch there is a spur track, known as "Lamb's side track," connecting with the main track. On the day the plaintiff was injured, a train of freight cars arrived from the south and stopped in the vicinity of the depot. A car was standing upon Lamb's side track, which it was desired to place in the train, and so the engine was detached from the train and moved up the track and was attached to such car. The engine was then backed south, down the track, with the car in its rear attached to the pilot. When they reached a point 8 or 10 rods north of Clark Street, and while still in motion, this car was detached from the engine, which ran upon the side track, leaving the car to run down the main track to the train. When this process was going on, the plain-

tiff came out of a store a few rods west of the track, and walked east on Clark Street towards the track. He approached the track just as the engine was passing, and after it had passed he attempted to cross the track and was struck by the car, receiving the injuries complained of. When he stepped upon the track he was enveloped with smoke and steam from the engine, which obscured his vision. He did not look north on the track until it was too late to avoid the injury. The railroad at this point descends somewhat to the south, and the car was running with considerable velocity. The point of the injury was about 50 feet north of the switch connecting the side track first above mentioned with the main track. After pulling the pin which detached the car from the engine, the brakeman went to the top of the car and partly set the brake for the purpose of checking its motion, in order that the switch might be adjusted before the car reached it. He then saw the plaintiff and called to him, but too late to avoid the accident. It does not appear that any other precautions were used to avoid injury to persons passing along the street while the switching was being done. By reason of his injuries one half of one of plaintiff's feet was necessarily amputated, he was disabled from attending to his business for over 13 months, and was subjected to an expenditure of considerably over \$1000 for surgical and other attendance, and for medicine.

The following special verdict was returned by the jury: "(1) Were the defendants, in doing this switching, guilty of any want of ordinary care and diligence, and was such want of ordinary care and diligence the cause of the injury? *Answer.* Yes. (2) Were the defendants guilty of want of ordinary care and diligence in making a flying or running switch across the public street at the place where this flying or running switch was made? *A.* Yes. (3) Were the defendants guilty of any want of ordinary care and diligence in making this flying or running switch, and did such want of ordinary care and diligence cause the injury? *A.* Yes. (4) Had the plaintiff waited until the smoke and steam made by the passing engine cleared away, before stepping on the track, or attempting to go on the track, could he have seen the car which followed the locomotive, had he looked? *A.* Yes. (5) Was the plaintiff struck by the car within the limits of Clark Street, or south of Clark Street? *A.* Within the limits of Clark Street. (6) When the plaintiff was struck by the car, was he walking south on the railroad, or was he attempting to cross the track? *A.* The plaintiff was attempting to cross the track at the usual crossing on Clark Street. (7) Was the plaintiff guilty of any want of ordinary care in stepping on the track, or attempting to go on the track, at the time he did, as testified by him, that contributed to the injury? *A.* He was not. (8) What are the damages the plaintiff sustained by reason of such injury? *A.* \$8000."

The rulings of the court on the trial, upon which errors are assigned, are stated in the opinion. Separate motions for judgment on the special verdict, and for a new trial, were made by the defendants, Abbott and the railroad company, both of which were denied, and judgment for the plaintiff was rendered for the damages assessed by the jury. The defendants, the railroad company and Abbott, appealed jointly from the judgment.

Gabe Bouck for respondent.

Howard Morris and C. W. Felker for appellants.

LYON, J.—1. The question of the alleged contributory negligence of the plaintiff will first be considered. The jury found, in answer to the fourth question submitted to them, that, had the plaintiff waited until the smoke and steam made by the passing engine cleared away before stepping on the track, he could have seen the car which followed the engine, had he looked. This finding is abundantly supported by the evidence. Counsel for the defendants, in his argument, maintained with great earnestness that this finding establishes the contributory negligence of the plaintiff, under the well-established rule that it is the duty of a person about to cross a railroad track before doing so to look and listen for approaching trains. The motion of the defendants for judgment was based upon this finding.

No court has applied and enforced the above rule more uniformly and consistently than has this court in numerous cases adjudicated by it. Had the plaintiff gone upon the track in front of the engine and been injured, it would probably have been a case for the application of the rule; but no such case is presented in this record. The plaintiff waited for the engine to pass before he went upon the track, and, having done so, the question we are to determine is, should he have ascertained before going upon the track that a running switch was being made, and a detached car was moving rapidly down the track upon him? We find nothing in the testimony which shows that the plaintiff knew, or ought to have known, the existence of those conditions when he approached the track for the purpose of crossing it. The jury may well have found from the testimony that the noise of the car on the track was drowned by that made by the passing engine; that when he stepped upon the track he was so enveloped in smoke and steam from the engine that he could not see the approaching car; and that he did not know or have any reason to suspect that a running switch was being made. Under these circumstances it would be manifestly unjust to apply to the plaintiff the rule above stated in all its rigor. The circumstances of the case bring it within the rule of *Butler v. Milwaukee & St. P. Ry. Co.*, 28 Wis. 487. In that case the death of the plaintiff's intestate was caused under similar circumstances. A running switch was being made; the locomotive and a portion

of the train had passed the point of injury, and the deceased was run upon and killed by the detached portion of the train, which, presumably, he did not see or look for. The circumstances of that case which, it was held, were sufficient to send the question of the contributory negligence of the deceased to the jury, were different from the circumstances of this case. There, the deceased was struggling with a frightened horse; here, the vision of the plaintiff was obscured by the smoke and steam which enveloped him. True, the deceased was acting under a somewhat pressing emergency, while this plaintiff was not; and so it must be conceded that that case is a stronger one for the plaintiff than is this. Yet we think the facts that at the moment of stepping upon the track the plaintiff was unable to see the car; that the engine had already passed him; and that he had no reason to apprehend the immediate approach of another car,—are sufficient to bring the case within the rule of the Butler Case. Under those facts it would be a usurpation of the functions of the jury to hold as matter of law that the negligence of the plaintiff contributed directly to the injury complained of. It must therefore be held that the question of the plaintiff's negligence was properly submitted to the jury, and that the fourth finding of fact does not establish that he was guilty of such negligence.

The court charged the jury that "the mere fact that the plaintiff might have seen the car approaching by looking, does not conclusively establish that the plaintiff was guilty of negligence;" and, also, "it is for the jury to determine whether, under all the circumstances of the case, it was negligence on the part of the plaintiff not to apprehend the approach of the detached car, nor look for the same." For the reasons above stated, we think there is no error in these instructions.

2. We are clearly of the opinion that the testimony was sufficient to send the question of the alleged negligence of the defendants to the jury. The making of a running switch at a point where the railroad track crosses public business streets in populous villages is a most dangerous proceeding, and reasonable care on the part of a railroad company to avoid accidents is a high degree of care, sometimes called the utmost care. The dangers to person and life involved in making a running switch at such a place, and the precautions which those operating the railroad are bound to use to prevent an accident, are very forcibly stated by Dixon, C. J., in the Butler Case. As to what precautions are required, he says: "If trains are to be divided in this way, and run by sections across the streets of populous towns and villages, the least that can be required of the company is that there should be some suitable person at the forward end of the foremost car to notify and warn people passing along the street, and likewise a man at the brakes, that he may set them, in order to avoid collision; and it might not be

unreasonable, in such cases, that a flagman should be required at the crossing as a further security against danger. Common prudence, and the most ordinary care, would dictate that at least the former course should be pursued, and all experience demonstrates the necessity of it."

Whether proper precautions were employed in the present case, or otherwise, is an inference to be drawn from the consideration of many facts and circumstances, and it is peculiarly the province of the jury to determine from the surrounding circumstances whether reasonable precautions were employed to avoid the accident. The descending grade of the road, the speed at which the car was moving, its distance from Clark Street when it was detached from the engine, and especially its distance from the point of accident when the brakeman resumed his place on the top of the car, and other surrounding circumstances, are all elements to be considered in determining this question of negligence. It would be a mere affectation to cite cases in this court, or elsewhere, which determine that in such a case the question of the presence or absence of negligence is for the jury.

It necessarily follows from the above observations that the jury are to determine what precautions were required of the defendants to avoid accident. Hence it was not error for the court to refuse to instruct the jury, as proposed on behalf of the defendants, that "failure to have guards or a flagman at the crossing on Clark Street is not evidence of negligence, and cannot be considered by the jury." In this connection an instruction, upon which error is assigned, will be noticed. The court charged the jury that "any negligence of their servants and agents, or any of them, if any such there was, was the negligence of the defendant; and if such negligence of the defendant's servants, or any of them, caused the injury to the plaintiff, and no negligence on the part of the plaintiff contributed to such injury, the defendants are liable to the plaintiff therefor." The criticism upon this instruction is that it does not specify the degree of negligence mentioned; that it holds the defendants liable for slight negligence as well as for want of reasonable care. Standing alone, the instruction is justly open to that criticism; but, upon looking into the general charge of the court, we find the rule as to the degree of negligence which would render the defendants liable correctly stated, and the instruction excepted to follows immediately thereafter. Hence, when the term "negligence" was employed in such instruction, the jury must necessarily have understood the court to mean the degree of negligence before referred to.

3. On the cross-examination of the witness Carroll,—the brakeman on the car when the plaintiff was injured,—who was called by the plaintiff, he was asked the following questions: "At which end of the car was the brake? Did you see the plaintiff here, Fer-



guson, when you stood on the top of the car, when it struck him? Did you see Mr. Ferguson at or about the time you set the brake, and if so, how far was he from the south end of the car, and did you holler to him to get off the track?" The first question was objected to as incompetent and immaterial; the others, as incompetent and not proper cross-examination. The objections were sustained, and error is assigned upon such rulings. Later in the trial it was proved by uncontradicted evidence that the brake was at the south end of the car; that Carroll stood on the top of the car and saw the plaintiff when the car struck him; and that the plaintiff was about 15 feet from the car when Carroll called out to him. If the rejection of this testimony in the first instance was erroneous, the error was cured by its subsequent admission, and especially so, since the testimony on those subjects was entirely uncontradicted.

4. The next question is whether the defendant company is liable in this action. Both answers deny that the company had any possession or control of the railroad, or was in any manner concerned with its operation or management. If such is the fact, counsel for the company has probably demonstrated, on principle and authority, that the company is not liable; but we do not think the record shows that such is the fact. The road upon which the accident happened is known as the "Wisconsin Central R. R." It is alleged in the complaint that the defendant company is the owner thereof, and this averment of ownership is not denied in either of the answers. Such ownership is therefore a verity in the case. When a railroad company owns a railroad in operation, bearing the name of the company, and which presumably the company constructed, the presumption is that such company operates it, and in order to relieve itself from liability for injuries to persons upon such road, caused by the negligence of the employees operating the same, the burden of proof is upon it to show that it does not operate the same. In this case there is no proof on that subject, and hence the presumption remains unshaken. We think the judgment properly went against the company, as well as against the defendant Abbott.

5. One of the grounds upon which the motions for a new trial were founded, is that the damages are excessive. The point was not argued in this court, although probably it is involved in the determination of this appeal. On the authority of *Berg v. Chicago, M. & St. P. Ry. Co.*, 50 Wis. 419; s. c., 2 Am. & Eng. R. R. Cas. 70, and the cases there cited, we cannot say that the damages awarded by the jury are excessive. This disposes of all the errors assigned as grounds for reversing the judgment adversely to the defendants.

The judgment of the Circuit Court must be affirmed.

**Flying or Running Switch.**—The use of the running or flying switch by a



railroad company at a crossing without taking special pains to give the public full warning amounts to negligence per se. *French v. Taunton, etc., R. Co.*, 116 Mass. 537; *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257; *Butler v. Milwaukee, etc., R. R. Co.*, 25 Wisc. 487; *Illinois, etc., R. R. Co. v. Hammer*, 72 Ill. 847; *Illinois Central R. Co. v. Baches*, 55 Ill. 397; *Brown v. New York, etc., R. R. Co.*, 32 N. Y. 597; *Sutton v. New York, etc., R. R. Co.*, 66 N. Y. 243; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461; *Phila. & Reading R. R. Co. v. Troutman*, 6 Am. & Eng. R. R. Cas. 117.

See *Clark v. Boston & Albany R. Co.*, 128 Mass. 1; s. c., 1 Am. & Eng. R. R. Cas. 134.

## CHICAGO, BURLINGTON AND QUINCY R. R. Co

v.

DOUGHERTY.

(110 *Illinois Reports*, 521.)

The statute requires every railroad corporation to cause a bell of at least thirty pounds weight to be rung or a steam whistle to be sounded at the distance of at least eighty rods before a public highway is reached by a train or locomotive, and kept so ringing or being sounded until the highway is reached; and when this is done, the railroad company has discharged its duty imposed by the statute, whether such signal given is heard or not. The statute does not require the giving of such signals of the approach of a train as to enable others absolutely to ascertain its approach and avoid being injured.

If a railway company has such a bell on an engine attached to a train as the statute requires, and it is rung in the manner required, then, so far as giving signals before the train reaches a public highway crossing is concerned, the company is without blame, whether the signal so given is observed or heeded, or not, by one attempting to cross the railroad track on the public highway.

Where the evidence is conflicting as to the fact whether a railway company, on the approach of one of its trains to a public road crossing, gave the statutory signals, it is error to state in an instruction, in a suit to recover damages for a personal injury to one while crossing the railroad track on a public highway, that if the defendant failed to give such signals of the approach of the train as to enable the person injured or killed to ascertain its approach and avoid injury, the company is liable.

Section 23, chapter 33, relating to costs, which authorizes ten per cent damages when the Supreme Court shall be of opinion that an appeal is prosecuted for delay, has no application to a case which is contested in good faith in that court. It applies only to cases appealed and not prosecuted, or such as are not prosecuted in good faith. This rule also applies to the Appellate Court.

On an issue whether a bell on an engine of a passenger train was rung eighty rods before the train reached a public road crossing, and kept ringing until the crossing was reached, witnesses for the plaintiff testified, in substance, that they did not hear the bell or whistle, although near enough to have heard it had one been rung or the other blown, while on the other hand there was proved by the fireman and engineer the size of the bell, its character

and condition, and that the bell was rung and the whistle sounded as required by the statute. *Held*, that it was a matter of grave importance that the law should be accurately given to the jury.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of La Salle County.

Samuel Richolson for the appellant.

Leland & Gilbert and Mayo & Widmer.

CRAIG, J.—This was an action brought by Bridget Dougherty, administratrix of the estate of Bernard Dougherty, deceased, against the Chicago, Burlington & Quincy R. R. Co. to recover damages for the death of Bernard Dougherty, who was killed while attempting to cross the railroad with a team and wagon at the crossing where Columbus Street crosses the railroad track, in the north part of Ottawa, on the 7th day of September, 1881. The declaration charges the defendant with a want of ordinary care,—first, in not ringing a bell or sounding a whistle; second, in running at too great a rate of speed; and third, in failing to station a flagman at the crossing where the deceased was killed. A trial of the cause before a jury resulted in a verdict and judgment in favor of the plaintiff for \$5000, which was affirmed in the Appellate Court, and the railroad company appealed from the judgment of the Appellate Court.

It was urged in the Appellate Court with much earnestness that the verdict of the jury was against the weight of evidence; but that question does not arise here, as the decision of the Appellate Court is final on controverted questions of fact.

It was also insisted that the court erred in the instructions to the jury. The first instruction given for the plaintiff to which exception was taken, is as follows:

“If the jury believe, from the evidence in this case, that on or about the 7th day of September, A.D. 1881, Bernard Dougherty was killed by a passenger train of the defendant, at the point where the defendant's railroad crosses Columbus Street, in the city of Ottawa; that he left him surviving Bridget Dougherty, as his widow, and Thomas Dougherty and Elizabeth Dougherty, as his only heirs at law; that said Dougherty, during all the time that he was driving towards said railroad crossing and attempting to pass over the same, and until his death, exercised ordinary care to ascertain whether said train was approaching said crossing, and to avoid being injured by said train; that said defendant drove said train over said crossing at a reckless, dangerous, and improper rate of speed, or failed to give such signals of the approach of said train as to enable Dougherty to ascertain the approach of said train, and avoid being injured by it, by the exercise of ordinary care; that in so driving said train, or in so failing to give such

signals, said defendant was guilty of a want of ordinary care, and that such want of ordinary care was the direct cause of Dougherty's death, and that his death was not the result of any want of ordinary care on his own part,—then and in such case the jury should find a verdict in favor of the plaintiff."

Section 43, chapter 114, of the Revised Statutes of 1874, provides: "Every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle, to be placed and kept on each locomotive engine, and shall cause the same to be rung or whistled, by the engineer or fireman, at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

In the third count of the declaration it was averred that defendant failed to keep a bell of thirty pounds weight to be rung and kept ringing, or a steam whistle to be in like manner sounded, for the distance of eighty rods, until the said crossing was reached by the locomotive. This averment was denied by defendant's plea, and hence an issue was presented by the pleadings for the jury to pass upon and determine, from the evidence which might be introduced bearing upon this branch of the case. In support of the averment of the declaration, the plaintiff called witnesses who, in substance, testified that they did not hear the bell or whistle, although near enough to the train to hear, had the one been rung or the other blown. On the other hand, the defendant proved, by the fireman and engineer, the size of the bell, its character and condition; that the bell was rung and whistle sounded, as required by the statute. Both by the pleadings and the evidence, an issue was presented whether proper signals of the approach of the train had been given by the railroad company before the crossing was reached. Under the issue thus presented it was a matter of grave importance that the law should be accurately given to the jury, in order that they might reach a correct conclusion, and thus mete out justice and right between the two contending parties. It will be observed that the statute heretofore cited requires a bell of at least thirty pounds weight on the engine to be rung at the distance of at least eighty rods before a public highway is reached, and shall be kept ringing until the highway is reached, or a steam whistle shall be sounded in like manner as a bell is required to be rung; but the statute does not require a bell to be rung or a whistle sounded in such a manner as will absolutely give notice to travellers of the approach of the train. The act is to be done in a certain specified manner, and when that is done the railroad company has discharged the duty imposed by law, whether the signal given is heard or not. But the instruction declares that the railroad shall be liable if it "failed to give such signals of the approach of said train as to enable Dougherty to ascertain the approach of said train, and avoid

being injured, by the exercise of ordinary care." This requirement is not imposed by the statute, and it was error to direct the jury that defendant was bound to do more than the statute had imposed upon it. Under this instruction the jury may have found, from the evidence, that the defendant rung the bell as required by the statute, and yet, unless the sound of the bell was such as to attract the attention of Dougherty and enable him to ascertain that the train was approaching, the company would be liable. The statute has never, so far as we are advised, received such a construction. Indeed, in *Peoria, Pekin & Jacksonville R. R. Co. v. Siltman*, 67 Ill. 72, an instruction in almost the identical language was condemned. See also *Chicago & Alton R. R. Co. v. Robinson*, 106 Ill. 142; s. c., 13 Am. & Eng. R. R. Cas. 620. If the railroad company had such a bell on the engine as the statute requires, and it was rung in the manner required, then, so far as giving signals is concerned, no blame can be attached to the company, whether the signals were observed or heeded by Dougherty or not. We think the instruction was erroneous,—and that, too, on a vital point in the case,—and for this error the judgment will be reversed. Nothing herein said, however, has any reference whatever to the supposed liability of the railroad company for a failure to station a flagman at the crossing where the accident occurred.

Other questions have been raised and argued by appellant's counsel, but we do not think it necessary to remark upon them here. The point indicated is decisive of the judgment, and the other questions argued will not be likely to arise on another trial, and hence it is not necessary to consume time in the discussion of them here.

The appellee has assigned as a cross-error that the Appellate Court erred in not giving appellee judgment for a sum not exceeding ten per cent on the amount of the judgment of the circuit court as damages. Section 23, chapter 33, of the statute entitled "Costs," which authorizes ten per cent damages where the Supreme Court shall be of opinion that the appeal was prosecuted for delay, has never been understood to apply to a case which has been contested in good faith in the Supreme Court, but the statute has only been applied to such cases as were appealed and not prosecuted, or such as were not prosecuted in good faith. Upon this question we are of opinion the decision of the Appellate Court was correct, but for the error indicated the judgment will be reversed, and the cause remanded.

Judgment reversed.

MULKEY, J.—I do not concur in the decision of this case. The instruction complained of, in my judgment, is not obnoxious to the objection urged against it. But conceding that it is, it is manifest it could not have materially affected the result, so far as the find

ing of the jury is concerned. The principle is well settled by a long line of decisions, that this court will not reverse for a mere formal error that could not have misled the jury.

**Strict Observance of Statutory Regulations as to Signals not Conclusive in Favor of Company.**—It has been held in a number of cases that a strict observance of statutory regulations as to giving signals on approaching a crossing is not conclusive in favor of the company. *Weber v. New York, etc., R. Co.*, 58 N. Y. 451; *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119; *Zimmer v. New York, etc., R. Co.*, 7 Hun (N. Y.), 552; *Bradley v. Boston, etc., R. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 Cush. 562; *Indianapolis, etc., R. Co. v. Stables*, 62 Ill. 313.

But see contra, *Chicago & Alton R. Co. v. Robinson*, 13 Am. & Eng. R. R. Cas. 620.

**Relative Weight of Positive and Negative Evidence as to Giving of Signal.**—For a complete list of the authorities on this point, see *Chicago & Alton R. Co. v. Robinson*, 106 Ill. 142; s. c. *infra*.

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## TYLER

v.

NEW YORK AND NEW ENGLAND R. R. Co.

(137 *Massachusetts Reports*, 238.)

In an action against a railroad corporation for personal injuries occasioned to the plaintiff, a boy fourteen years old, the evidence tended to show that he, in company with another boy, was driving a horse attached to an open wagon, when it came into collision with the defendant's train at a grade crossing; that the street on which he was riding sloped downward through a cut for one hundred feet until it entered upon the railroad track; that, for a portion of this distance, the smoke-stack of an approaching engine could be seen through a picket fence, and, at a distance of from fifteen to thirty-five feet, a clear view of the track could be had; and that a train could be heard by a person in that street before it came in sight through the fence. The plaintiff testified that he drove into the street towards the railroad track on an easy trot; that, when he came to the crest of the hill, about one hundred feet from the track, he pulled up, and afterwards drove at a rate half-way between a trot and a walk; that the other boy pointed out to him a house, which had been hidden from their view by an intervening building until they were over the crest of the hill; that he looked at the house, and then turned to his horse; that the other boy called his attention to the train when he was within from ten to forty-six feet of the track, and he pulled up the horse, but, thinking he could not stop him, whipped him, drove across, and the wagon was struck on the hind wheel; and that there was nothing to prevent his hearing the train, except the rattle of the wagon. Both boys and another witness, who heard the train coming while sitting in a house near the track, with the windows shut, before the boys turned to look at the house above mentioned, testified that they did not remember hearing the bell on the engine ring. The engineer and the fireman testified that the bell did

ring; but the whistle did not sound; and there was no flagman at the crossing at the time of the accident. *Held*, that the question whether the plaintiff exercised due care was for the jury.

TORT for personal injuries occasioned to the plaintiff by the negligence of the defendant. Trial in the Superior Court, before Mason, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show the following facts: The plaintiff was driving his father's horse and wagon on Bridge Street, in Hyde Park, on March 18, 1882, when it came into collision with a train of the defendant going towards Boston from Readville, where Bridge Street crosses the tracks of the defendant's railroad. The wagon was an ordinary open market wagon, and in the wagon were the plaintiff, a boy fourteen years and three months old, who had been used to horses, and driving horses all his life, another boy whom he had just taken into the wagon, some empty baskets, and about thirty-two pounds of meat.

The public had been in the habit of crossing the track at Bridge Street for over twenty years, during which time it had been kept in repair by the defendant and its predecessor in title. Bridge Street is about two hundred feet long from Water Street to the tracks of the defendant corporation, and, at one hundred feet from the corner of Bridge Street and Water Street, it slopes downward through a cut, until it enters on the tracks of the railroad at the foot of the hill. The grade of Bridge Street, for the first fifty feet from the track, is twelve feet in a hundred, and, for the next fifty feet, seven feet in a hundred.

The foot of the slope along the railroad is ten feet, and the top of the slope fifteen feet, from the southerly rail of the inward track. The bank on the Readville side of Bridge Street increases from the height of seven and three quarters feet, at the corner of Bridge Street and the location of the railroad, to fifteen and a half feet, at two hundred and twenty feet from the centre of Bridge Street. On the top of the embankment for the first ninety feet was an unpainted picket fence about five feet high, and beyond that point was a tight board fence for about two hundred feet further. There was a signboard erected over the crossing in accordance with law, in plain view down Bridge Street, from the corner of Bridge Street and Water Street.

A person could see, through the picket fence along the top of the bank, the smoke-stack of an engine approaching from the direction of Readville, when the smoke-stack was two hundred and thirteen feet distant from the centre of Bridge Street, if he was standing in Bridge Street seventy-five feet distant from the tracks; and three hundred and forty-two feet, if he was fifty feet distant therefrom; and, at a distance of from fifteen to thirty-five feet, a clear view of the track toward Readville could be had. A train



could be heard by a person in Bridge Street, before it came in sight through the fence.

The plaintiff testified that he drove into Bridge Street toward the tracks of the defendant's railroad on an easy trot; that, when he came to the crest of the hill, about one hundred feet from the tracks, he pulled up, and afterwards drove the horse at a rate half way between a trot and a walk; that the other boy told him he would show him where he lived, and, as they came in view of this other boy's home, the latter showed it to him; that this house lay on the Boston side of Bridge Street, and was hidden from view by an intervening house until the wagon was over the crest of the hill; that, when the house came in view, he looked at it, and then turned to his horse. He did not testify, nor did anybody else, that he looked for, listened for, or thought of, the train, or had the crossing in mind, except as might be inferred from the following testimony: The plaintiff testified that he "drove into Bridge Street, looked to the right first; there was a board fence; the other boy was at the left; looked towards Boston first; showed me his house as soon as I could see it; I then turned and tended to my horse; the other boy called my attention to the train." From the corner of Bridge Street and Water Street to within some thirty feet of the track, (which is nearer the track than the point where the other boy's house comes in view,) no train can be seen coming from the direction of Boston. The plaintiff also testified that, about a week after the accident, he went to the other boy's house, and asked the latter if the plaintiff stopped to listen for the train; and that there was nothing to prevent his hearing the train, except the rattle of the wagon. The two boys testified that they did not remember hearing the bell on the engine ring. They did not testify that the bell did not ring. The engineer and the fireman testified that the bell did ring. There was no other evidence on this question. The whistle did not sound. The plaintiff further testified that, when he was within about ten to forty-six feet of the track, the other boy called his attention to the train, and he pulled the horse up; but, thinking he could not stop him, he whipped him, drove across, and the wagon was struck on the hind wheel.

The evidence further tended to show that the train was heard coming by a woman, in a room in the second story of a house on the Boston side of Bridge Street, between Water Street and the track, with the windows shut, before the boys turned to look at the other boy's house; and she also testified that she did not remember hearing the bell ring.

It further appeared that there was no flagman at the crossing at the time of the accident; that the plaintiff had walked over the crossing twice, and driven over it once, before the accident, and had lived within less than half a mile of the crossing for a year; that, when he drove over the crossing before, about three months

before the accident, the flagman of the defendant (with whom he was acquainted), who attended to the crossing at the Fairmount crossing (the other crossing of the defendant in Hyde Park), was attending to this crossing, because, as he judged, the Fairmount crossing was then closed. This was all the evidence in favor of the plaintiff, on the question whether he exercised due care.

The defendant requested the judge to rule that there was no evidence on which the jury could find that the plaintiff was in the exercise of due care.

The judge refused to rule as requested, but ruled that it was a question for the jury to decide, among other things, whether the plaintiff exercised due care; and that, if the crossing was such as to require a flagman, it was the duty of the defendant, rather than of the town, to station one there, and, if it did not do so, it was guilty of negligence.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. C. Loring for the defendant.

J. E. Cotter for the plaintiff.

W. ALLEN, J.—The evidence discloses the circumstances of the collision, and shows that the plaintiff exercised some degree of care. He checked the speed of his horse at a distance of about one hundred feet from the railroad; he looked to see if the track was clear; he saw the approaching train, and attempted to avoid it before he reached the track. Whether he exercised ordinary care was plainly a question for the jury, unless there was some undisputed fact so obviously inconsistent with ordinary care on his part that the court can say that no reasonable question was presented for the jury to pass upon. There are three circumstances which the defendant contends are, as matter of law, inconsistent with due care.

1. The plaintiff looked to see a house pointed out to him by his companion at the side of the street as they approached the railroad. The house was hidden from their view by intervening buildings until they were over the brow of the hill, which was about one hundred feet from the track. The plaintiff testified that, when the house came into view, the other boy showed it to him; and that he looked at it, and turned to his horse. It does not appear that the plaintiff's attention was not continuously upon the crossing, nor that his perception of it was appreciably interrupted, nor that the approaching train could have been seen from the place where he then was, nor that the train was not seen as soon as it came in sight. The jury may well have found that the act was not negligent, and that it did not contribute to the injury.

2. The plaintiff was riding in a wagon, and did not stop his horse to listen for the cars. The defendant contends that this fact

should, as matter of law, preclude the plaintiff from recovering in this action. The fact is not conclusive evidence of negligence; it was for the judgment of the jury, in connection with its circumstances.

3. The defendant relies upon the fact that, after the plaintiff was aware that the cars were coming, he did not stop his horse in time to avoid a collision. It is argued that, as the plaintiff knew he was about to cross a railroad, it was his duty to watch for cars, and to drive in such a manner that he could avoid a collision if a train appeared; that he had no right to go so near the track that he could not stop before reaching it, until he had assured himself that there was no danger. The true proposition is, that the plaintiff was bound to use reasonable care to avoid getting into a position in which he could not escape a collision. The fact that he did find himself in such a position is not conclusive evidence that he was there by his own negligence. He may have been there in consequence of the negligence of the defendant; and it may have been without the negligence of either party. Whether he was there in the exercise of due care must depend upon the evidence of care drawn from facts which must be found by the jury, and is, we think, in this case, a question for the jury. It is not contended that the plaintiff was in fault in not avoiding the cars after he perceived them. Whether he used due care to know if a train was coming, and to be in a condition to avoid it, were questions which depended upon inferences from facts to be found by the jury. The age and experience of the plaintiff; the degree of watchfulness and care actually exhibited by him; the speed at which he was driving; his distance from the track when his attention was called to the cars, whether it was ten or forty-six feet; the obstructions to a view of the track on which the train was approaching; the negligence of the defendant as affecting the conduct of the plaintiff, whether it consisted in the absence of a flagman, or in not ringing the bell or sounding the whistle, or in the speed of the train, or in all combined,—were among the facts to be found by the jury, and from which, in connection with the particular facts and manner of the collision, they only could find the fact of due care or of negligence on the part of the plaintiff. The jury have found that the negligence of the defendant was the cause of the injury and that there was no contributory negligence of the plaintiff; and we cannot see that that finding was not upon sufficient evidence.

Exceptions overruled.

**Crossings with View Obstructed.**—As to the relative duty of the railroad company and of travellers on the highway on approaching such crossings, see *Loucks v. Chicago, M. & St. Paul R. Co.*, and note, *infra*.

BOWER

v.

CHICAGO, M. AND ST. P. RY. CO.

(61 *Wisconsin Reports*, 457.)

Upon the evidence in this case it is *held* that the trial court properly refused to nonsuit the plaintiff, whose team and wagon were struck and injured by a detached locomotive running rapidly in advance of a belated passenger train at a highway crossing near a village; the testimony as to the possibility of seeing the locomotive while in a deep cut through which it passed just before reaching the crossing, and as to whether the bell was rung and the whistle blown, being conflicting, and there being evidence that after seeing the locomotive the driver could not have safely stopped his team or turned it into a side road.

A person approaching a railroad crossing with a team, and having reason to suppose that a regular passenger train has recently passed from one direction, is not guilty of negligence if he fails to look constantly in that direction, especially when it would be impossible to see or hear an approaching train because of an embankment, or other obstruction to sight and sound.

An instruction that it was the duty of a person approaching a railroad crossing to have looked up the track, if, by so doing, he could have ascertained the approach of a train at a sufficient distance to have avoided it, is *held* proper. The question, what was such sufficient distance, was for the jury.

The question being whether the bell was rung and the whistle blown as a locomotive approached a highway crossing, evidence that those things were not done at a similar crossing three miles distant was admissible.

APPEAL from circuit court, Walworth County.

E. Merton and Fish & Dodge for respondent.

John W. Cary, D. S. Wegg, and Burton Hanson for appellant.

ORTON, J.—A servant was driving the team of the plaintiff hitched to a wagon for the carriage of pop, soda-water, etc., of peculiar construction and of considerable value, on the street or highway leading into and through the village of Lyons, and towards a crossing of the railroad, and when one quarter of a mile from the crossing he looked at his watch and found that it was a few minutes past 4 o'clock P.M., and looked westward on the track of the railroad and could not see any train approaching, and especially the passenger train which was due before that time. He then drove on at a walk towards the crossing, and when about 15 rods therefrom he looked again and neither saw nor heard anything of the train or a locomotive west of the crossing, and when within 10 or 12 feet from it he first saw and heard a disconnected locomotive approaching the crossing at great speed, and he attempted to urge on his team as fast as possible to cross the track before it, and the rear end of the wagon was struck by it with great force, and the

team, wagon, and contents were damaged. This locomotive was being run by itself, about five minutes in advance of the passenger train a short time before then due at such crossing; and approached the crossing through a deep cut of some four or five hundred feet in length, and of increasing depth from its commencement at its west end; and from the crossing towards the west, to or near its centre, where its greatest depth was eight feet. The embankment towards the approaching train was covered with tall weeds and grass, and there was evidence that the locomotive or its smoke-stack could not have been seen by the driver until he was from 10 to 15 feet of the crossing. There was evidence that the team could not have been safely stopped or turned away when the locomotive was first seen or heard, and that the only safe way was to drive on and if possible escape it. As to whether the locomotive could have been seen when the team was at several distances up to a hundred feet away from the crossing the evidence was conflicting, and it was very conflicting as to whether the bell was rung or whistle blown when the locomotive approached the crossing; but the whistle gave two short "toots," as it was called, just at the crossing, and when the wagon was struck. This crossing was about 300 feet from the depot in the village, and the locomotive ran by it with great speed. There was some evidence that there was a road leading off from the one on which the team was driven towards the east, near the crossing, into which the team might have been turned, but the driver testified that he could not have turned them into it safely. The jury were taken upon the ground, and viewed the situation of the crossing and its surroundings, and by such view are presumed to have tested the correctness of the testimony relating to the road leading east from the south side of the crossing, and to the possibility of seeing the locomotive in the deep cut at certain distances on the road, approaching the crossing from the south, and to the obstructions in the way of seeing it, and must be presumed to have found that the driver could not have safely stopped his team when near the crossing, or turned into the road leading east, and that he could not have seen or heard the locomotive in the deep cut in time to have avoided the collision.

On this statement of the facts, which, though brief, is believed to be fair, we do not think the circuit court would have been justified in granting a nonsuit, or in ordering a verdict for the defendant, as requested by its learned counsel. The driver may have well supposed that the passenger train had already passed the crossing when he looked at his watch and found by it that it was after 4 o'clock, and after its usual time of passing; but he looked up the track to the west at least twice before he came very near the crossing, and saw and heard nothing of the train or locomotive. He had no reason to suppose that there was a locomotive five minutes ahead flagging the train. If it had been the train it would have

made considerable noise, and he might have heard it if he did not see it; but a detached locomotive, which makes but little noise, he might not have heard, if the bell was not rung or the whistle blown, as the jury might have found from the evidence. At the great speed at which the locomotive was running it took it but a few seconds to pass through the deep cut, and it certainly cannot be said that it was negligence in law that the driver did not see it, or might have seen it had he looked just at the time it was in the cut. It would not be a want of ordinary care if he did not look in the direction of this unexpected locomotive all the time while he was approaching the crossing, for his team required some of his attention. The large and stationary umbrella over his head does not seem to have obstructed his view in the least.

The plaintiff's servant does not appear to have been guilty of any want of ordinary care. As to the defendant company, if the bell was not rung or the whistle blown when the locomotive was approaching this crossing, and the locomotive was run with great speed in order to keep it out of the way of the passenger train, which was evidently running to make up lost time, and all these facts the jury might have found from the evidence, it was certainly guilty of great negligence and want of care. The village of Lyons, in which this crossing was situated, was not such as to limit by law the speed of trains to six miles per hour in crossing its streets; and yet it was quite a village, and had streets much used, and a depot, and it would seem to be reasonable that neither trains nor detached locomotives should be run through such a village and by the depot at a very high rate of speed, when no possible signals might in all cases protect persons lawfully travelling over the street crossings. The charge of the court was unusually clear, correct, and full on all questions of law affecting the case. The jury were told that it was the duty of the servant to have looked up the track when he approached the crossing, and "if, by using his eyes in looking and his ears in hearing, he could have ascertained the approach of the train at a sufficient distance to avoid the same, and thus prevented the accident in question, then it was his duty to so make use of his eyes and ears; and plaintiff cannot recover if his servant failed to do so, and the accident was caused or directly contributed to by such failure." This instruction was excepted to because the court did not tell the jury what was such sufficient distance. That was clearly a question of fact for the jury, and not of law for the court. All of the 17 instructions asked by the learned counsel of the defendant, except four, related to the use of the eyes and ears of the driver, and his duty to look and see and listen and hear the approaching locomotive before he came to the crossing, and they are all objectionable as making it the duty of the driver to have looked all the time and constantly in that direction and at every point within 100 feet of the crossing. This, as we



have said, was not a reasonable requirement of the driver, and, besides, such an instruction should be qualified, and the duty of the driver would be modified by the condition that, if he had looked, he could have seen, and if he had listened he could have heard, the approaching locomotive in time to have avoided the collision. Of the other four instructions asked, two relate to the contributory negligence of the plaintiff, and were substantially given in the general charge, and the other two are general and abstract propositions of law as to the relative duties of drivers of wagons over crossings, and of the engineer or those in charge of trains approaching crossings, which duties were very clearly defined by the court in the charge in reference to the case on trial, and that alone was sufficient.

A witness was asked on behalf of the plaintiff whether the bell of this locomotive was rung or its whistle blown when it was approaching at this time a crossing three miles west of Lyons, in the village of Springfield. This question was objected to by the counsel of the defendant, and the objection was overruled, and the witness answered the question in the negative. As to whether the bell was rung or the whistle blown at the Lyons crossing the evidence was conflicting. This evidence had a direct bearing upon that question, and had some weight, and might properly have had, against the testimony of the defendant's witnesses that the bell was rung and whistle blown at the crossing in question, and supporting the testimony of the plaintiff's witnesses that they were not. It related to the manner in which this locomotive was managed and run on this very trip, and near the place of the accident, in using such signals at street or road crossings, and would establish more than a possibility, from which a probability could be inferred, that no such signals were used at the Lyons crossing, and would create a strong and direct probability that they were not, because it was not customary to use such signals at other like crossing. Such testimony is approved by the current of authority, when confined to the usage of the same machinery. Many of the cases are cited in *Gibbons v. Railroad Co.*, 58 Wis. 335; s. c., 13 Am. & Eng. R. R. Cas. 469, and in that case such evidence is approved. These are all the questions raised on this appeal. The case was tried at the circuit and argued in this court by able counsel, and nothing was omitted on either side which could have any possible bearing upon the result. On the whole record we have been unable to find any error. The judgment of the circuit court is affirmed.

**Crossings with View Obstructed.**—For a full collection of the authorities as to the duty of the railroad company and of persons travelling on the highway upon approaching such crossings, see *Loucks v. Chicago, M. & St. P. R. Co.*, and note, *infra*.

LOUCKS

v.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

(31 *Minnesota Reports*, 526.)

The plaintiff, driving upon a public street across a railroad track, was struck by a train of cars, the approach of which he did not discover until immediately before he drove his horses across the track. The view of the track in both directions was partially obstructed. The evidence going to show that the plaintiff was mindful of the danger and watchful, according to his reasonable judgment, to avoid it; that at the time when he might first have seen or heard the train, he had reason to suppose that no train was coming from that direction, while his attention to the track in the opposite direction was more apparently necessary; that the cars were even then close at hand, running at a high rate of speed, and he in a place where he could not safely turn his horses, nor hold them before the passing train,—it is considered that negligence was not conclusively imputable to the plaintiff by the law, but that it was for the jury to determine whether the plaintiff was negligent.

To run a locomotive and train of cars, which cannot be readily stopped, at a high rate of speed, and without any signal by bell, whistle, or otherwise, across a much-travelled public street in a village, where the crossing is dangerous to travellers by reason of obstructions concealing the approach of trains, no excuse appearing for the omission to give signal of its approach, is negligence, although there exists no statutory requirement respecting the giving of such signals.

One who is called upon to exercise care to avoid danger from the acts of others, may, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they will act with reasonable caution and not with culpable negligence.

The court instructed the jury to disregard the opinions of expert witnesses, based upon hypothetical statements of facts, if the jury should find the hypothesis to be not in accordance with the facts. *Held*, no error.

The plaintiff, having been a farmer for many years, and engaged in carrying on a farm, was competent to testify as to the value of his own labor. It was a proper subject for the opinion of witnesses.

The question of granting a new trial, because of the conduct of counsel, considered as being within the discretion of the trial court.

APPEAL by defendant from an order of the district court for Fillmore County, Farmer, J., presiding, refusing a new trial after a verdict of \$3000 for plaintiff.

Cameron, Losey & Bunn for appellant.

J. D. Farmer and J. N. True for respondent.

DICKINSON, J.—The action is for the recovery of damages for personal injuries sustained by the plaintiff, by reason of a freight train of the defendant coming in collision with the plaintiff's wagon at the crossing of Section Street over the railroad, in the village of Spring Valley. We are to consider whether the case

shows conclusively, and as matter of legal imputation, negligence in the conduct of the plaintiff, so that he should not recover for the alleged negligence of the defendant.

The depot buildings are east of Section Street. The grade of the railroad descends both from the east and from the west as it goes towards the depot. The buildings shown on the diagram, standing on the west side of Broadway and on the south side of Main Street, prevent the traveller upon the street from seeing the railroad in the direction in which they stand.

A freight train, consisting of 21 cars, with the locomotive, bound east, had backed up from the station westward, a distance of 1200 feet or more west of Section Street, for the purpose of gaining headway to overcome the ascending grade east of the station. At about the time when this train was coming east again, the plaintiff, in his farm wagon, driving a span of horses, coming south down Broadway, turned east into Main Street and drove to the Section Street crossing, intending to cross the track. As the plaintiff came into Main Street, his view of the track south of him was unobstructed from a point a little west of the crossing up to the west side of Broadway, and, as he proceeded east on Main Street, the line of vision to the railroad west of Broadway past the buildings standing on that street would be gradually extended until it was obstructed by the intervening of the livery barn and other buildings near Section Street. When opposite those buildings, he could see the track to the westward 1200 feet from the crossing. After the view in that direction was shut out by the buildings on Main Street, he could not see up the track westward again until he came within a short distance of the crossing. At the distance of 48 feet from the place of collision he could have seen the track 187 feet west of that point, and at about 40 feet from the crossing the view westward became again unobstructed.

The evidence tends to show that from the centre or travelled track of Main Street one could not see that part of the railroad extending about a quarter of a mile east of the crossing, and the view in that direction was obstructed, until, within a distance of a few feet of the track, one looking past the mill shown on the diagram could see the track to the depot and east of that point. The evidence tends to show that there were ditches on both sides of the travelled part of Section Street, near the crossing, so that it would be difficult to turn a team there, unless it was done carefully and deliberately. The speed of this train as it returned eastward to the point of collision at Section street, as estimated by many witnesses, was from 25 to 45 miles an hour. The defendant's witnesses make it less, the minimum estimate being 10 or 12 miles an hour. No signal of its approach was given by bell or whistle, until, the danger of the collision being imminent, the whistle was sounded for brakes.

The plaintiff did not see the train as it backed up west of the crossing, and does not appear to have had any special reason to expect that a train would be coming from that direction. He testified that he looked at the track as he went from Broadway down Main Street, and that, as he came near the livery barn, he looked backward toward the west, and neither saw nor heard any train. When he was opposite this barn he was about 200 feet from the crossing, and could then see 1200 feet west of the crossing, nor would this view become obscured until he came within about 166 feet of the track. He testified that, after he passed the barn, going not faster than four miles an hour, he looked to the east, as he approached the crossing, to see if any train was coming from that direction. When he could see past the mill, seeing no train, he turned to look again to the west, and saw the train very near to him. His horses' heads were then about at the north rail of the three tracks, or about 10 feet from the place of collision. He said that he was frightened, and, obeying his first impulse, he struck his horses, and they jumped forward across the track, and the locomotive struck the rear end of his wagon as it passed. He testified also that he did not think 10 men could have held his horses, (in the face of the train as we understand him to mean.) The wind was blowing from the east, and some noise was caused by steam at the elevator, near the crossing. These facts lend reasonable support to plaintiff's testimony that he could not hear the approaching train. The testimony of two other witnesses, (Baldwin and Seeker,) one of whom testified in behalf of the defendant, also corroborates the plaintiff in this respect. The testimony of Baldwin also supports the plaintiff as to the fact that the train had not come within the view of the plaintiff, as he passed from Broadway to Section Street.

The case thus outlined conduces to show that the plaintiff exercised watchfulness and care until he passed the buildings on Main Street and came near the crossing on Section Street. It is probable that the conduct of prudent men in approaching this crossing, after the view to the west had become obstructed, and as the line of the track to the east, which had until then been out of view, was coming within the range of vision, would be somewhat controlled by the previous observation of the track to the west, which might lead one to suppose that no train was near at hand coming from that direction. Perhaps the most natural course of a careful man would be to look steadily to the east until his view should become somewhat extended, since he could have had no assurance that cars were not close at hand coming from that direction. Under such circumstances, the case is not one where the law conclusively imputes negligence from the failure to look to the west at the very instant when a view in that direction became possible, since, at the same instant, and perhaps more imperatively, atten-

tion was demanded in the opposite direction. The conduct of the plaintiff at that moment may reasonably have been regulated somewhat with regard to the fact that his previous observation had led him to suppose that no train was close at hand coming from the west.

Consideration must be given to the brief interval that had elapsed, since, if his evidence is worthy of belief, he saw the track clear for about a quarter of a mile in that direction; and, again, we must bear in mind that the distance between the point where he could first see the track to the west, after coming near the crossing, and the point where the view became open to the east, (at which time plaintiff did again look west,) is very small, perhaps some 10 or 15 feet. Going at the rate of four miles an hour, plaintiff would consume probably less than three seconds in passing over this space, and during that time he was looking to the east, where the track was just coming into view. As he looked again to the west the train was so close upon him, as the case shows, that danger was apparent, either in attempting to hold his team where they were, or to turn quickly upon the narrow roadway between the ditches, or in going forward. In such an emergency, only such reasonable conduct as men are capable of hastily determining upon and carrying into execution is required. Again, consideration is to be given to the absence of cautionary signals, which may have contributed to induce the plaintiff to suppose that no train could be close at hand. We shall have occasion to refer to this subject again.

In brief, there is evidence, the credibility of which it was for the jury to determine, that the plaintiff was constantly thoughtful of the danger to be apprehended, and watchful to guard against it. Whether the fact was so, and whether the plaintiff's precautions to avoid danger were such as reasonable prudence demanded, under the somewhat distracting circumstances shown in the case, it was for the jury to determine. We cannot, as an imputation of the law, pronounce his conduct to have been negligence. *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72; *Continental Imp. Co. v. Stead*, 95 U. S. 161.

The court instructed the jury that, under the charter under which the defendant was operating its road, it was the duty of the engineer to sound the whistle or ring the bell at a distance of at least 80 rods before reaching the crossing. Our general statutes contain no such requirement as is indicated in this instruction, and for the purposes of the case we will assume that no such obligation was imposed by the terms of the charter under which the road was operated. Nevertheless, the defendant was not prejudiced by the charge. It is a notorious fact that all locomotives are supplied with whistles and bells for the purpose of giving warning where that is necessary. Independent of legislative requirement, wher-

ever the circumstances are such as to render it dangerous to run a locomotive across a highway without previously giving warning of its approach by bell or whistle, it will be deemed negligence to omit to give such warning. Ordinarily this would present a question of fact for the jury; (see *Shaber v. St. Paul, M. & M. Ry. Co.*, 28 Minn. 103;) but to run a heavy train, which cannot be readily stopped, at a high rate of speed, and without any signal by whistle, bell, or otherwise, across a much-travelled public street in a village, where the crossing is admitted to be of a character dangerous to travellers by reason of obstructions concealing the approach of trains: is so clearly dangerous that, no excuse being shown for the omission, the law imputes negligence. Such were the undisputed facts in this case, and the court was justified in instructing the jury that the omission to give reasonable warning by bell or whistle was negligence. See *Philadelphia, etc., R. Co. v. Stinger*, 78 Pa. St. 219, 225, 227; *L. & N. R. Co. v. Commonwealth*, 13 Bush. 388; *Philadelphia & T. R. Co. v. Hagan*, 47 Pa. St. 244; *Roberts v. C. & N. W. Ry. Co.*, 35 Wis. 679.

Independent of statutory requirement, it could not be said, as a proposition of law, that such signal should be given at least 80 rods from the crossing. What would be a proper and reasonable distance would be a question of fact, to be determined with regard to the circumstances. But since it is not claimed in this case that any signal was given, and the proof is that none was given, the instruction, in so far as it may have been inaccurate, did not prejudice the cause of the defendant. The only effect of the charge, as applied to the facts in this case, was that the unexplained neglect of the defendant to give warning by bell or whistle of the approaching train was negligence; and this we think was not error.

The court in its charge to the jury, speaking of the concurrent rights and obligations of the parties, said that "each party had a right to rely, at all times and under all circumstances until the contrary appeared, that the other would use ordinary care and diligence to prevent a collision." This language, when considered in connection with the rest of the charge, does not fairly bear the meaning which the appellant imputes to it,—that is, that each party might regulate its conduct with absolute reliance upon the presumption that the other would exercise ordinary care, and hence that the plaintiff might, relying upon this presumption, attempt to cross the track, when he perceived the danger of doing so, or that he might neglect to be watchful against possible danger. The court added, immediately after the language above given, this: "To be a little more particular, it was the duty of the defendant . . . But it was the duty of the plaintiff to approach the crossing at such a reasonable rate of speed, and to use all of his senses with such ordinary and reasonable care and diligence, as was required, under all the circumstances, to avoid a collision." The



court further and correctly instructed the jury as to the duty of the plaintiff in approaching the crossing, and that, if he omitted that duty, he could not recover.

The language to which exception was taken, when taken in connection with the rest of the charge, plainly meant no more than that each party, in regulating his own conduct, might have regard to the presumption that the other would also exercise reasonable care; and this involves no error. *Ernst v. Hudson R. R. Co.*, 35 N. Y. 9; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Langhoff v. Milwaukee & P. Ry. Co.*, 19 Wis. 489; *Kennayde v. Pacific R. Co.*, 45 Mo. 255. From the very nature of the case the measure of caution which a person should exercise to keep out of the dangerous way of a railroad train must be adopted with reference to the probable or apprehended conduct of those operating the train; and the exercise of reasonable caution, not culpable negligence, is ordinarily to be expected from others. We are satisfied that the jury were not misled.

We think the hypothetical question put to Dr. Johnson embraces, substantially and fairly, the essential facts of the case, as shown by the evidence.

There was no error in the charge to the jury to disregard the evidence (opinions) of expert witnesses, based upon hypothetical questions, if the jury should find the hypothesis involved in the questions to be not in accordance with the facts.

It is claimed the court erred in allowing the plaintiff to give in evidence his own opinion of the value of his services for labor prior to the accident. The occupation of the plaintiff was farming, and had been for many years, he being engaged in carrying on a farm on his own account. It is not to be presumed that the jurors were all farmers, nor that they were qualified, without proof, to determine the value of a farmer's labor. It was a proper subject for the opinion of competent witnesses.

In the course of the trial, the counsel for the plaintiff offered in evidence a certain document, and, in connection with the offer and against the objection of the defendant, stated and commented upon the contents of the document, in the hearing of the jury, and, after having done so, withdrew his offer. An exception was allowed to the conduct of counsel. We are not able to determine the motives which induced the conduct complained of, nor is it apparent that it resulted in prejudice to the defendant. The granting or refusing of a new trial upon this ground was a matter proper for the exercise of the discretion of the trial court, and no reason is apparent for disturbing its decision.

The refusal of the court to communicate to the jury certain specific instructions, requested by the defendant, was justified by the fact that the general charge had fully covered the matter embraced in the requests.

There are no other questions presented which we deem deserving of special mention.

Order affirmed.

GILFILLAN, C. J., dissenting.—I dissent. It is clear that this crossing is, to one coming from the north, very dangerous, requiring unusual care and watchfulness to avoid trains crossing either from the east or west. This is so from buildings on each side of Section Street, near the track, cutting off a view of the track during part of the time when approaching it. It is clear, also, that plaintiff was perfectly familiar with it, as he was in the habit of crossing it frequently, and he must be supposed to have known the degree of care necessary to avoid trains. It may be assumed, though it is hard to believe, that as he came along Main Street he looked to the west until the intervening buildings prevented his seeing the track, and saw no train. He may have thought he could calculate how long a train would take to reach the crossing from the farthest point west at which he could see one on the track up to the time he came to the buildings, and how long it would take him, at the rate he was driving, to pass the crossing. That, however, was not a sure precaution. Such calculations were liable to mislead, either from a train approaching more rapidly than he took into account, or his team going more slowly than he supposed; too liable to mislead to be prudently relied upon to the neglect of means that with absolute certainty would apprise him of a train coming from the west. When he came to a point forty feet from the track, he had only to look towards the west, and he would have seen the train and avoided the accident. To say that one approaches such a crossing with due care when he relies solely on a precaution which the best observation and reflection would have shown him might not be entirely safe, when he knows there is an infallible means to avoid danger, requiring no time nor effort, and so obvious that ninety-nine men in a hundred would instinctively—involuntarily, as it were—resort to it, confounds, as appears to me, all notions of care in approaching such a danger. I do not overlook the fact that, as he approached, greater attention was required towards the east than the west, but the turning of his attention from the east to the west for a half second would have shown him the danger when 40 feet from the track. I think he was grossly negligent.

**Duty of Engineer approaching Railroad Crossing with View Obstructed.**—A higher degree of care is required upon the part of a railroad company in approaching a crossing where the view is obstructed, than in approaching a crossing where no obstruction exists. *Cordell v. New York, etc., R. Co.*, 70 N. Y. 119; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123; *Illinois, etc., R. Co. v. Benton*, 69 Ill. 174; *Craig v. New York, etc., R. Co.*, 118 Mass. 481; *Rockford, etc., R. Co. v. Hillmer*, 72 Ill. 235; *Pennsylvania R. Co. v. Matthews*, 86 N. J. L. 531; *Prescott v. Eastern R. Co.*, 113 Mass. 370; *Kelly v. St. Paul, etc.,*

R. R. Co., 6 Am. & Eng. R. R. Cas. 93; Haas v. Grand Rapids & I. R. Co., 8 Am. & Eng. R. R. Cas. 268; Funston v. Chicago, R. I. & P. R. Co., 14 Am. & Eng. R. R. Cas. 640; Nehrbas v. Central Pacific R. Co., 14 Am. & Eng. R. R. Cas. 670.

**Obstructions Caused by Railroad Company.**—The railroad company is bound to even a higher degree of care when the existence of the obstruction is its own fault. Mackay v. New York, etc., R. Co., 35 N. Y. 75; Cordell v. New York Central R. Co., 70 N. Y. 123; Indianapolis, etc., R. R. Co. v. Smith, 75 Ill. 112; Dimick v. Chicago, etc., R. Co., 80 Ill. 338; Chicago, etc., R. Co. v. Lee, 87 Ill. 454; Lehnertz v. Minneapolis, etc., R. Co., 15 Am. & Eng. R. R. Cas. 870.

**Unexpected and Extraordinary Accidents.**—The company is not bound, however, to guard against accidents extraordinary in their nature, the occurrence of which could not have been reasonably anticipated. Shaw v. Boston, etc., R. Co., 8 Gray (Mass.), 45; Baltimore, etc., R. Co. v. Breinig, 25 Md. 378; Gruppen v. New York, etc., R. Co., 40 N. Y. 84.

**Duty of Traveller on Highway approaching Railroad Crossing with View Obstructed.**—When a traveller approaches a railroad crossing where the view of the track is obstructed, he is ordinarily bound to take extraordinary care to prevent accident. Besiegel v. New York Central R. Co., 84 N. Y. 622; Penna. R. R. Co. v. Beale, 73 Pa. St. 504; Central R. R. Co. v. Feller, 84 Pa. St. 226; Artz v. Chicago, R. I. & P. R. Co., 34 Iowa, 153; Bunting v. Central Pacific R. Co., 14 Nev. 351; Thomas v. Delaware, etc., R. Co., 2 Am. & Eng. R. R. Cas. 648; Philadelphia & Reading R. R. Co. v. Carr, 6 Am. & Eng. R. R. Cas. 185; Kansas Pacific R. Co. v. Richardson, 6 Am. & Eng. R. R. Cas. 96; Tucker v. Duncan, 6 Am. & Eng. R. R. Cas. 617; Laverenz v. C., R. I. & P. R. Co., 6 Am. & Eng. R. R. Cas. 274; Salter v. Utica & B. R. Co., 8 Am. & Eng. R. R. Cas. 437; Haas v. Grand Rapids & I. R. R. Co., 8 Am. & Eng. R. R. Cas. 268; Funston v. Chicago, R. I. & P. R. Co., 14 Am. & Eng. R. R. Cas. 640; Schaefer v. Chicago, M. & St. P. R. Co., 14 Am. & Eng. R. R. Cas. 696.

**Duty of Drivers of Teams to Dismount and Walk Ahead.**—In some cases it has been held that when a person drives up to a railroad crossing with the view obstructed, he is bound to dismount from his vehicle and walk ahead to see whether there is a train in sight. If he neglects this precaution, he is, it is said, guilty of contributory negligence. Pennsylvania, etc., R. Co. v. Beale, 73 Pa. St. 504; Central R. R. of N. J. v. Feller, 84 Pa. St. 226.

But in other cases the existence of such a duty is denied. Kelly v. St. Paul, M. & M. R. Co., 29 Minn. 1; Dimick v. Chicago & N. W. R. Co., 80 Ill. 338; Duffy v. Chicago & N. W. R. Co., 32 Wisc. 274; Richardson v. New York C. R. Co., 45 N. Y. 846; Mackay v. New York Central R. Co., 35 N. Y. 75.

In some cases the question has been left to the jury. Dolan v. Delaware & H. Canal Co., 71 N. Y. 285.

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## STATE OF MAINE

v.

## MAINE CENTRAL R. R. Co.

(76 Maine Reports, 357.)

It is settled law in this State that in actions against railroad companies for injuries to persons, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed did not by his want of ordinary care contribute to produce the accident.

One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established.

In a prosecution, by indictment, against a railroad company for negligently causing the death of a person at a crossing, the amount of the forfeiture between the minimum and maximum sums fixed by the statute should be assessed by the jury.

INDICTMENT against the Maine Central R. R. Co. for negligently causing the death of Adoniram Judson Pickard at a railroad crossing in Carmel, on the twenty-sixth day of December, 1882, prosecuted for the benefit of his widow and children.

The opinion states the material facts.

J. Hutchings and F. H. Appleton, county attorney, for the State.

Wilson & Woodford for the defendant in error.

WALTON, J.—This is an indictment against the Maine Central R. R. Co. for negligently causing the death of a person. It appears that December 26, 1882, at about half-past six o'clock in the evening, Doct. Pickard of Carmel, in an attempt to cross the railroad with a horse and sleigh, was struck by a passing train and instantly killed. A trial has been had and a verdict of guilty returned against the railroad. The question is whether the evidence justified this verdict. We think it did not.

It is settled law in this State that, in prosecutions of this kind, whether in form civil or criminal, the burden is upon the party prosecuting to show that the person injured or killed did not by his own want of ordinary care contribute to produce the accident. *Gleason v. Bremen*, 50 Maine, 222; *State v. Grand Trunk Ry.*, 58 Maine, 176.

In the case first cited it was held that the law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact, to be established by him, as a necessary part of his case, that at the time of the accident he was in the exercise of due care. And in the second case cited it was held, after a full and careful examination of the question, that in the trial of indictments against railroads to recover the forfeiture created by our statute for negligently causing the death of a person, "the same rules of evidence, and the same principles of law, should be applied, as in like cases when redress is sought by a civil action for damages."

We must, therefore, regard it as settled law in this State that, in this class of cases, whether in form civil or criminal, the burden of proof is upon the party prosecuting to show due care on the part of the person injured or killed, at the time of the accident; or, in other words, that his want of due care did not contribute to produce the injury complained of.

In this case there is not only a total want of such evidence, but the proof, as far as it goes, tends strongly to establish the contrary. No one witnessed the accident except the engineer and fireman on the train. The engineer's account of the transaction is that, as he approached the crossing, and when the engine was not over fifteen feet from it, the horse came right up into the head-light, and the pilot of the engine took right under the sleigh, and threw the deceased right up on to the head-board; that he stopped the train as soon as he could, and went forward and found the man dead upon the front of the engine. The fireman says he saw nothing till they went on to the crossing; that he then got a glimpse of a horse and saw a man come up on to the pilot. These are the only accounts we get of the transaction. How it happened that the deceased drove on to this crossing directly in front of an approaching train is left to conjecture alone.

It is claimed that no bell was rung or whistle sounded; and that, in consequence of this failure, the deceased was not apprised of the approach of the train. The evidence seems to us to preponderate most overwhelmingly in favor of the fact that the bell was rung and the whistle sounded. But suppose they were not, still, it seems to us impossible to believe that the deceased undertook to cross the track in ignorance of the approach of the train. He was a man of mature years, and in the full possession of his faculties. His sight and hearing were good. He lived in the immediate neighborhood of this crossing, and must have been acquainted with the time and speed of the trains. The evening was still and the ground frozen, and the rumbling of the train could be heard at a great distance. The head-light was on, and the cars all lighted, and the deceased's view of an approaching train for a considerable portion of the way as he drove from his house to the crossing unobstructed. If, under these circumstances, the deceased undertook to cross the track in ignorance of the approach of the train, the inference is irresistible that he did not exercise that degree of vigilance which the law requires. He could not have used his eyes nor his ears as the law required him to use them. The fact must not be overlooked that the train was very near, as otherwise he would not have been struck by it. One in the full possession of his faculties, who undertakes to cross a railroad track at the very moment a train of cars is passing, or when a train is so near that he is not only liable to be, but is in fact, struck by it, is *prima facie* guilty of negligence; and, in the absence of a satisfactory excuse, his negligence must be regarded as established. The excuse offered in this case is not satisfactory. The evidence so overwhelmingly preponderates in favor of the fact that the bell was rung and the whistle sounded that we cannot regard the alleged negligence of the railroad company in these particulars as proved. But if we concede that this was a question of fact for the jury, and that the

court has no right to interfere with their finding, still the inference is irresistible, that the deceased did not exercise that degree of vigilance which the law requires, or he would have known of the approach of the train without these signals. And if not ignorant of its approach (which we believe to be the fact) then the relation of cause and effect between the alleged negligence and the accident is wanting; and the verdict must be regarded as wrong upon that ground. It is not enough to establish negligence and an accident. It must also be shown that the negligence was the cause of the accident. An omission to ring the bell or sound the whistle could not have been the cause of the accident if the deceased had notice of the approach of the train by other means. Our belief is that the deceased did have such notice; that he could not have been so unobservant as to neither see nor hear the approach of that train; and, consequently, that the alleged negligence in omitting to ring the bell or sound the whistle could not have been the cause of the accident. But if he did not have such notice; if he drove on to that crossing in total ignorance of the approach of a train; then the conclusion seems to us inevitable that he must have been exceedingly negligent in the use of his eyes and his ears. So that, whichever view we take, the verdict is clearly wrong. In the one case the want of the relation of cause and effect invalidates it; in the other, contributory negligence.

Similar views are expressed and similar conclusions sustained, even in those States in which it is held that the burden of proof to show contributory negligence is on the defendant. A fortiori they ought to prevail, where, as in this State, the burden of proof is not upon the defendant to show contributory negligence, but upon the party prosecuting to show the absence of it.

In *Railroad v. Heileman*, 49 Pa. St. 60, the court held that the omission of a traveller when approaching a railroad crossing to look and listen for approaching trains is negligence per se; not merely evidence of negligence, but negligence itself, and should be so declared by the court, and not submitted to the jury; that while it is true that what constitutes negligence is generally a question of fact for the jury, it is not always so; that when the law fixes the standard of duty, an entire omission to perform it is not merely evidence of negligence to be submitted to a jury, it is negligence itself, and should be so declared by the court; that even on a common road, travellers must look out for the approach of other vehicles passing; that this is more necessary at railroad crossings, because movements upon a railroad are more rapid, and because the consequences of a collision are likely to be more disastrous; that precaution, looking out for danger, is a duty imposed by law, and that to rush heedlessly on to a crossing over which the law allows engines of fearful power to be propelled, without looking



and listening for a coming train, is not merely an imperfect performance of duty, it is an entire failure of performance.

And in *Railroad v. Beale*, 73 Pa. St. 504, Mr. Justice Sharwood, in delivering the opinion of the court, says that there never was a more important principle settled than that which declares that the omission to look and listen for the approach of trains before attempting to cross a railroad track, is not merely evidence of negligence to be submitted to a jury, but negligence per se, and to be so declared by the court; that it is not so important to the railroad companies as to the travelling public; that the omission of this duty often results in collisions by which the lives of hundreds of passengers are lost; and that travellers should be taught that the performance of this duty is due, not only to themselves, but to others also.

In *Railroad v. Crawford*, 24 Ohio St. 631, the law upon this subject seems to us to be stated accurately. It is there said that unquestionably ordinary prudence requires a person in the full enjoyment of his faculties, before attempting to pass over a known railroad crossing, to use his faculties of hearing and seeing for the purpose of discovering and avoiding danger from an approaching train; and that the omission to do so, without a reasonable excuse therefor, is negligence, and will defeat an action to recover for an injury to which such negligence contributed.

In *Dascomb v. Railroad*, 27 Barb. 221, it is said in a case very similar to the one we are now considering, that when negligence is the issue, it must be a case of unmixed negligence; that this rule is important, salutary in its effects, and should be maintained in its purity; that the careless are thereby taught that if they sustain an injury to which their own negligence has contributed, the law will afford them no redress.

In *Wilcox v. Railroad*, 39 N. Y. 358 (a case in every essential particular like the one now under consideration), the court held that when one is killed in attempting to cross a railroad track within the limits of a public highway, and at a public crossing, if it appear that the deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it is to be presumed that he did not look; and that by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery; that in crossing a railroad track ordinary sense, prudence, and capacity require a traveller to use his ears and eyes so far as he has an opportunity to do so, and a failure to do so is negligence sufficient to preclude a recovery for any injury he may receive, in case of accident; and that the negligence of the company in not ringing the bell or sounding the whistle, is no excuse for the traveller's neglect. After citing many authorities, Mr. Justice Miller said: The effect of the cases cited is to sustain the principle that, where the

negligence of the party injured or killed contributes to produce the result, he cannot recover; and that the omission of the company to ring the bell or sound the whistle near the crossing of a highway does not relieve the person who is about to pass over the highway from the obligation of employing his sense of hearing and seeing, to ascertain whether a train is approaching.

In *Railroad Company v. Houston*, 95 U. S. 697, it was held that the omission of the engineer in charge of a railroad train to sound its whistle or ring its bell does not relieve a traveller from the necessity of ascertaining by other means whether or not a train is approaching; that negligence of the employees of the company is no excuse for negligence of the traveller; that the traveller upon the highway is bound to listen and to look, before attempting to cross a railroad track, in order to avoid an approaching train, and not to go carelessly into a place of possible danger; that if he omits to look and listen, and walks thoughtlessly upon the track, or if looking and listening, he ascertains that a train is approaching, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes to it as to deprive him of all remedy against the railroad company; that if one chooses to take risks he must suffer the consequences; that they cannot be visited upon the railroad company; that in such cases it would not be error to instruct the jury peremptorily to return a verdict for the defendants.

The cases in which similar views are expressed are very numerous. But the soundness of the views expressed in the cases already cited is so self-evident, that we deem it unnecessary to cite other cases to support them. It will be seen that it is not important to determine whether Doct. Pickard's negligence consisted in not ascertaining that a train was approaching, or in knowingly attempting to cross in front of it. In either case it defeats a recovery. And in the latter case, for the further reason that it destroys the relation of cause and effect between the alleged negligence of the defendants and the accident.

One other question remains for consideration; and that is, whether the amount of the forfeiture in this class of cases shall be assessed by the court or the jury. We think it should be assessed by the jury. It seems to be uniformly held, both in England and in this country, that when damages are given for the death of a person, they are to be measured by the pecuniary loss sustained by those to whom the damages are given. This of course raises an issue of fact in relation to which the evidence may be conflicting. It is therefore a fit question to be submitted to a jury. Besides, if it is not submitted to the jury, two trials may be necessary, one to ascertain the guilt of the defendant, and the other to ascertain the amount of the forfeiture; for the judge who tries the case to the jury may not be the one to render judgment in the case; and the

latter cannot assess the damages or forfeiture without first hearing the evidence upon the question of pecuniary loss; and, in some cases, the latter may be the more important of the two trials. It is therefore the opinion of the court that the amount of the forfeiture, between the minimum and maximum fixed by the statute, should be assessed by the jury.

Motion sustained and the verdict set aside.

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MISSOURI PAC. RY. Co.

v.

PIERCE.

*(Advance Case, Kansas. January 7, 1885.)*

The failure of a railroad company to sound the locomotive whistle three times, at least 80 rods from the point where the railroad crosses any public road or street which lies outside of a city or village, is negligence; but such negligence is not attributable to the railway company in a case where the injury complained of was done at a street crossing within the limits of a city.

Where inapplicable instructions are given, which may have misled the jury to the prejudice of the party complaining, the verdict cannot be permitted to stand.

ERROR from Miami County.

W. A. Johnson for plaintiff in error.

Brayman & Sheldon for defendant in error.

JOHNSTON, J.—This was an action, brought by W. J. Pierce, as plaintiff; against the railroad company, to recover damages for the negligent killing of a cow owned by him. It was alleged by the plaintiff that on the twenty-second day of May, 1882, in the city of Paola, Miami County, Kansas, the defendant, with its engine and cars, carelessly and negligently ran against and killed the animal, and that it was not done through any carelessness or neglect on the part of the plaintiff. The railway company denied all allegations of carelessness or negligence on the part of its employees, and claimed that the plaintiff was guilty of contributory negligence, and was not entitled to recover. A trial was had before the court and jury, and the verdict and judgment given against the defendant railway company, and it brings the case here, alleging error of the court in its instructions to the jury, and in overruling the motion for a new trial.

It appears that on May 22, 1882, several cows belonging to plaintiff were being driven by his son along Locust Street, in the city of Paola, to a pasture on the other side of the defendant's railroad track, and that one of the cows was struck and killed by a

passing freight train at the point where the railroad intersects Locust Street, and within the limits of the city. Some distance east of Locust Street, and at the eastern limits of the city, there is a public highway. The train which killed the cow was approaching from the east, and considerable testimony was offered by the plaintiff tending to show that the persons in charge of the train had failed to sound the whistle attached to the locomotive at least 80 rods before reaching the eastern boundary of the city. Among the instructions the court gave to the jury are the following:

“(7) The law of this State requires every railroad company to attach a steam-whistle to each locomotive engine, and to be sounded three times, at least eighty rods from the place where the railroad shall cross any public road or street. In this case, it is alleged that the injury complained of is within the limits of Paola, a city of the second class, and if this be true, as alleged, the whistle should be blown at least three times, eighty rods before crossing the highway on the outside of the city limits.

“(8) The jury are instructed that the neglect to sound the whistle three times of an engine, as mentioned in said statute, while it is negligence, yet is not of itself such negligence as will justify a recovery for damages to persons or property injured on the track. To entitle the plaintiff to recover for such injury, it must appear from the evidence that the injury was the result of such omission to sound the whistle. It is not enough to create a liability for injuries caused by a railroad train to prove the whistle was not sounded three times. The jury are required to further find and believe from the evidence that the injury complained of was caused by reason of such neglect. Whether the failure to sound the whistle on approaching the highway by the train in question was or was not the cause of the injury complained of, is a question of fact to be determined by the jury on consideration of all the evidence.

“(9) The jury are instructed that in a suit against a railroad company for injuries inflicted at a highway crossing, and if it appears from the evidence that no whistle sounded three times within the distance of eighty rods, as hereinbefore explained, before reaching the crossing; and if it appears from the evidence that the company was guilty of other negligence which may have caused the injury; and it is doubtful whether the injury was caused by not blowing the whistle, or by such other negligence, or by both combined,—then the company will be liable for the injury, provided the jury believe from the evidence that the injury resulted from either or both of said causes, and that the plaintiff was free from fault or negligence, as explained in these instructions, although the jury may believe from the evidence that the cow in question was killed by the defendant's locomotive, and that there was a failure to sound the whistle eighty rods before reaching the

city limits at the crossing; and if the jury believe from the evidence that there was no connection between the failure to blow the whistle and the injury to the cow, then the jury should find for the defendant, unless the jury further find from the evidence that the injury to and death of the cow was the direct result of negligence or misconduct of defendant other than the failure to sound the whistle."

These instructions indicate that the case was tried by the court upon the theory that the statute imposing upon railway companies the duty of sounding the locomotive whistle at least eighty rods from the place where the railroad crosses the public road or street, is applicable to any injury or damage done at the crossing of streets within the limits of a city. The statute, or so much of it as is necessary to be quoted here, is as follows:

"A steam-whistle shall be attached to each locomotive engine, and be sounded three times, at least eighty rods from the place where the railroad shall cross any public road or street, except in cities and villages." Section 60, c. 23, Comp. Laws 1879.

It will be observed that cities and villages are specially excepted from the provisions of this statute. If the collision had occurred at the crossing of a highway on the outside of a city these instructions would have been proper and applicable, but as it occurred inside of the city they were clearly improper and misleading. It has frequently been ruled by this court that the failure to sound the whistle of the locomotive in accordance with this requirement is negligence (*Railroad Co. v. Rice*, 10 Kan. 426; *Railroad Co. v. Phillipi*, 20 Kan. 12; *Railroad Co. v. Wilson*, 28 Kan. 639,) but that a railroad company is not liable for damages by reason of the failure to sound the whistle (if it was not otherwise negligent), unless the injury complained of is attributable to or caused by such failure. *Railroad Co. v. Morgan*, 31 Kan. 77; s. c., 13 Am. & Eng. R. R. Cas. 499. Nor do we think that the failure of the company to observe a statutory rule applicable only outside of cities can be attributed to it as negligence in the case of an injury done at a place where the rule is not operative or applicable, as within the limits of a city. The purpose of the legislature in requiring this warning to be given before reaching a highway, was manifestly to afford protection to persons or property that might be upon or passing over such highway, and therefore the omission of the company to comply with this statutory requirement cannot be held to be negligence as to any injury done, except at the crossing of the particular highway for which the whistle is required to be sounded. The company owed no duty under this statute to parties crossing Locust Street, within the limits of Paola, which is a city of the second class. Greater care and caution are necessary, and should be exercised, by railroad companies in the running of their trains within the limits of cities, and usually ordinances are en-

acted by city councils regulating the speed of trains passing through the city, as well as prescribing different and stricter rules in the matter of signals and warnings than are required to be given by the statute under consideration, at crossings outside of cities. In this case it was, doubtless, the duty of the trainmen to keep a lookout for the crossings, and to exercise diligence and care to avoid collision or accident at the crossing of Locust Street; but this duty did not arise from the statute in question. The instructions of the court, therefore, which brought this statute so prominently before the jury, and directed them to be governed by its provisions in determining whether the company had been guilty of negligence in the collision which occurred inside of the city limits, was inapplicable and misleading; and when inapplicable instructions are given, which may have misled the jury to the prejudice of the party complaining, the verdict cannot be permitted to stand. *State Sav. Ass'n v. Hunt*, 17 Kan. 532; *Raper v. Blair*, 24 Kan. 374; *Railroad Co. v. Hay*, 31 Kan. 177; s. c., 13 Am. & Eng. R. R. Cas. 600. The evidence in the case was conflicting, and while there is considerable testimony in the record which tends to show negligence on the part of the employees who were in charge of the train, there was also positive testimony to the contrary offered in behalf of the defendant, and we cannot say that the jury were not controlled in their verdict by the erroneous instructions. The other exceptions we think are not well taken, and require no discussion. The judgment of the court below will be reversed, and the cause remanded for a new trial.

All the justices concurring.

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KEAN

v.

BALTIMORE AND OHIO R. R. Co.

(61 *Maryland Reports*, 154.)

If the plaintiff who was injured by the alleged negligence of the railroad company was in fact drunk, and failed to observe the reasonable precautions to avoid danger to himself while in the act of crossing the defendant's road tracks, yet, if the defendant's servants in charge of the train, after discovering the perilous situation of the plaintiff, could, by the exercise of reasonable care and diligence, have avoided the accident, they were bound to do so. If they possessed knowledge of the plaintiff's situation, and failed to make proper and reasonable exertions whereby he could have been saved, the defendant would be liable, though it was by reason of the negligence or drunken condition of the plaintiff that he was found in the situation of danger. In such case their failure to use due care and exertion would con-



stitute negligence, which would form the direct and proximate cause of the injury.

If, on the other hand, the plaintiff was on the crossing, in such condition as not to be able to take care of himself, or paid no heed to the warnings of the approach of the train; or if from negligence or reckless indifference to the perils of his situation he failed to observe the precautions necessary to his safety, and his situation was not known to those in charge of the train, and, while observing a careful lookout, was not discovered by them in time, by the use of reasonable care and diligence, to save him from injury, then his own want of care and reckless negligence in putting himself in such place of danger, would deprive him of all ground of action against the defendant. And this would be the case though there may have been negligence on the part of the defendant in detaching the engine from the cars, and allowing the latter to run down the switch by their own momentum or by the force of the grade. In such case the negligence would be mutual or concurrent, and that of the plaintiff so directly contributing to the production of the accident as to preclude the right of recovery.

APPEAL from the Circuit Court for Frederick County.

This action was originally instituted in the Circuit Court for Allegany County, and was thence removed, at the suggestion of the defendant, to the Circuit Court for Frederick County, where it was tried. The appellant sought to recover for an injury which he sustained through the alleged negligence of the appellee, in being run over by its cars on the night of the 27th of July, 1879, while he was in the act of crossing the tracks of the defendant at the point where they intersect Williams Street in the city of Cumberland.

Ferdinand Williams and William Walsh for the appellant.

W. Irvine Cross and A. Hunter Boyd for the appellee.

ALVEY, C. J.—In the trial of this case in the court below the matters in issue were submitted to the jury, and this court is not required by any ruling that was made, to review the facts of the case. We have only to deal with the legal propositions as we find them embodied in the prayers offered by the respective parties. And the legal propositions involved and really applicable to the case would seem to be few and simple, and such as have been announced by this court in repeated decisions.

The action having been brought for the alleged negligence of the defendant, whereby the plaintiff was injured, the general and leading proposition is, that the plaintiff must show the injury he received was occasioned exclusively by the negligence of the defendant. He is certainly not entitled to recover for the consequences of any negligence of his own. If therefore it be found that the plaintiff has himself been guilty of any negligence or want of ordinary care that has directly contributed to cause the accident, he can have no cause of action against the defendant for the injury received, though the latter may likewise have been guilty of negligence. And this whether the plaintiff was sober or drunk at the time the accident occurred.

This general proposition, however, is subject to another which is equally well established, and that is, that though the plaintiff may have been guilty of negligence, and that negligence may, in fact, have remotely contributed to the production of the accident, yet, if the defendant could, in the result, by the exercise of reasonable care and diligence, in view of the circumstances of the case, have avoided the accident, the plaintiff's negligence, being the more remote cause, will not excuse the defendant. In this case, therefore, if the plaintiff was in fact drunk, and failed to observe the reasonable precautions to avoid danger to himself while in the act of crossing the defendant's road tracks, or while upon the tracks of the road, though improperly there, and under circumstances to constitute negligence on his part, yet, if the defendant's servants in charge of the train, after discovering the perilous situation of the plaintiff, could, by the exercise of reasonable care and diligence, have avoided the accident, they were bound to do so. If they possessed knowledge of the plaintiff's situation, and failed to make proper and reasonable exertions whereby he could have been saved, the defendant would be liable, though it was by reason of the negligence or drunken condition of the plaintiff that he was found in the situation of danger. In such case their failure to use due care and exertion would constitute negligence which would form the direct and proximate cause of the injury.

But, on the other hand, if the plaintiff was on the crossing or at any other place on the road-tracks of the defendant, in such condition as not to be able to take care of himself, or paid no heed to the warnings of the approach of the train; or if from negligence or reckless indifference to the perils of his situation he failed to observe the precautions necessary to his safety, and his situation was not known to those in charge of the train, and, while observing a careful lookout, was not discovered by them in time, by the use of reasonable care and diligence, to save him from injury, then his own want of care and reckless negligence in putting himself in such place of danger, would deprive him of all ground of action against the defendant. And this would be the case though there may have been negligence on the part of the defendant in detaching the engine from the cars and allowing the latter to run down the switch by their own momentum or by the force of the grade. In such case the negligence would be mutual or concurrent, and that of the plaintiff so directly contributing to the production of the accident as to preclude the right of recovery.

With these well-settled principles in view, there is but little difficulty in passing upon the several prayers for instruction that were ruled upon by the court below. The theory of the first prayer offered by the plaintiff would seem to be correct enough, though it is greatly wanting in explicit reference to the facts bearing upon the question of the contributory negligence of the plaintiff. The

very general terms in which that question was put to the jury by that prayer, hardly gave them an intelligent guide for their consideration of the proper relation of that question to the other facts upon which the plaintiff sought to recover. Generalities such as are employed in that prayer, in ordinary contemplation, mean little or nothing; and the modification of the prayer by the court did not add much to its perspicuity. As, however, the case is to be remanded for retrial, because of other defects in some of the instructions given, the defects suggested in the first prayer may then be corrected.

The second prayer offered by the plaintiff was properly rejected. It ignored the evidence of the contributory negligence of the plaintiff, and based the right of the plaintiff to recover too exclusively upon what was supposed to be the original negligence of the defendant. It failed in fact to direct the mind of the jury to the real question in the case, upon which the right to recover turned; that is, the negligence of the plaintiff himself, and the failure on the part of the defendant to use reasonable care to avoid the consequences of such negligence.

In granting the third prayer offered by the defendant we think there was error. By that prayer the Court was required to say to the jury, that if the plaintiff was drunk, and by his drunkenness he had deprived himself of the exercise of his faculties, and that he would have been enabled, but for that condition, to have avoided the collision and prevented the injury complained of, the plaintiff could not recover, "unless the jury should find that the defendant, by its agents, was guilty of wanton or wilful neglect, in not stopping the cars after the plaintiff was discovered on the track."

This is manifestly too strong a proposition. As we have already stated, it was the duty of the defendant, upon discovering the plaintiff upon the track, to use reasonable care and diligence to avoid the accident. It is not consistent with that rule of duty to instruct the jury that any conduct of the defendant's servants short of wanton or wilful neglect of duty (as those terms might be understood by the jury), in not stopping the cars after discovering the plaintiff on the track, would be justifiable; and such proposition is not sanctioned, we think, either by reason or authority. As before said, if the defendant discovers the negligence of the plaintiff in time, by the use of ordinary or reasonable care, to prevent the injury, and fails to make use of such care for the purpose, he is justly chargeable with reckless injury. But, in such case, to enable the defendant to make a defence, grounded upon the negligence of the plaintiff, he must show that he used, upon discovering the negligence of the plaintiff, reasonable and proper care to avoid the consequences of that negligence. Without this the defence cannot be maintained.

The seventh prayer of the defendant, which was granted, is too

general in its terms, and fails to define with precision the relative duties of the parties, with reference to the facts of the case. It would seem, moreover, to be inconsistent with some of the other propositions granted by the Court. And the eighth prayer of the defendant, also granted, is defective in omitting to submit to the jury the question as to the exercise of care and diligence on the part of the defendant, to avoid the consequences of the plaintiff's negligence.

Under the local law for Frederick County, where this case was tried, this Court is required to review the rulings and decisions of the Court below excepted to by the appellee as well as those excepted to by the appellant. (Code, Pub. L. Law, Art. 11, secs. 41, 42.) The defendant excepted to the granting of the prayers on the part of the plaintiff, and to the rejection of several offered by the defendant.

The plaintiff's third prayer which was granted, we think ought to have been rejected. It is too general and indefinite to be a safe guide to the jury in a case like the present. It failed to bring to the attention of the jury any of the facts in relation to the alleged negligence of the plaintiff, except only the facts that he may have been drunk, and was on the defendant's road south of the crossing. As the prayer concluded to the right of the plaintiff to recover, all the facts available to the defence ought to have been submitted to the jury.

We discover no valid objection to either the first, second, fourth, fifth, sixth or ninth prayers of the defendant, and think they ought to have been granted. All these prayers, except the ninth, conclude against the right of the plaintiff to recover; and upon the principles we have stated, each of these prayers (except the ninth) would seem to present upon the facts being found as therein stated, a good defence to the action. The tenth prayer of the defendant we think was properly rejected.

The questions raised in the defendant's first and second bills of exception taken to the admissibility of evidence, have not been pressed in argument, and we do not understand that those exceptions are relied on. The use of the evidence objected to is limited and restricted by the second and ninth prayers of the defendant, which we say ought to have been granted.

For the errors in the rulings excepted to by the plaintiff the judgment must be reversed and a new trial ordered.

Judgment reversed, and new trial awarded.

**Drunkenness is Evidence of Negligence only.**—Intoxication does not constitute *per se* negligence. But it is evidence to go to the jury from which they may infer negligence. *Cramer v. Burlington*, 42 Iowa, 315; *Thorp v. Brookfield*, 36 Conn. 321; *Alger v. Lowell*, 8 Allen, 402; *Burns v. Elba*, 82 Wisc. 265; *Stuart v. Mathiasport*, 48 Me. 477; *Healey v. New York*, 3 Hun (N. Y.), 103; *Robinson v. Pioche*, 5 Cal. 560; *Baltimore, etc., R. Co. v. Boteler*, 88

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Md. 568; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Marquette, H. & O. R. Co. v. Handford, 39 Mich. 537; Maguire v. Middlesex R. Co., 115 Mass. 239; Illinois, etc., R. Co. v. Cragin, 71 Ill. 177; Illinois Central R. Co. v. Hutchinson, 47 Ill. 408; O'Keefe v. Chicago, R. I. & P. R. Co., 32 Iowa, 467; Davis v. Oregon & C. R. Co., 8 Oregon, 172; Meyer v. Pacific R. Co., 40 Mo. 151; Whalen v. St. Louis, K. C. & N. R. Co., 60 Mo. 323; Bradley v. Second Ave. R. Co., 8 Daly, 289; Button v. Hudson River R. Co., 18 N. Y. 248; Ditchett v. Spuyten Duyvil & P. M. R. Co., 5 Hun (N. Y.), 165.

**Proof of Drunkenness only Admissible when it Contributed to Injury.**—Unless the drunkenness of the party injured actually contributed to the injury, the fact is not admissible in evidence against him. Maguire v. Middlesex R. Co., 115 Mass. 239; Meyer v. Pacific R. Co., 40 Mo. 151; Davis v. Oregon & Cal. R. Co., 8 Oregon, 172.

**Drunken Person is Bound to same Measure of Care as Sober Person on Approaching Crossing.**—The fact that a person approaching a railroad crossing is intoxicated does not excuse him from taking all the ordinary precautions required of sober persons. Toledo, P. & W. R. Co. v. Riley, 47 Ill. 514; Chicago, R. I. & P. R. Co. v. Bell, Adm'r, 70 Ill. 102; Chicago City R. Co. v. Lewis, 5 Bradw. App. (Ill.) 242.

**Duty of Company as to Drunken Trespassers on Track.**—When intoxicated persons place themselves upon a railroad track and being in such a condition that they are unable to appreciate or escape from danger are run over by a passing train, they will ordinarily be held to have been guilty of such contributory negligence as will defeat recovery. The company will not be held liable unless its servants have been guilty of wilful or gross neglect after they have become aware of the party's perilous condition and position. Illinois Central R. Co. v. Hutchinson, Adm'r, 47 Ill. 408; O'Keefe v. Chicago, R. I. & P. R. Co., 32 Iowa, 467; Whalen v. St. Louis, K. C. & N. R. Co., 60 Mo. 323; Button v. Hudson River R. Co., 18 N. Y. 248; Bradley v. Second Ave. R. Co., 8 Daly (N. Y.), 289; Southwestern R. Co. v. Hankerson, 61 Ga. 114; Marquette, H. & O. R. Co. v. Handford, 39 Mich. 537; Houston & T. C. R. Co. v. Sympkins, 54 Tex. 615; s. c., 6 Am. & Eng. R. R. Cas. 11; Dinwiddie, Adm'r, v. Louisville & N. R. Co., 9 Lea (Tenn.), 309; s. c., 15 Am. & Eng. R. R. Cas. 483.

**Evidence of Drunkenness.**—In negligence cases evidence as to the ordinary habits of the party injured in regard to the use of intoxicating liquors is not admissible in evidence to prove negligence on his part or for any other purpose. Chicago, R. I. & P. R. Co. v. Bell, Adm'r, 70 Ill. 102; Baltimore & Ohio R. Co. v. Boteler, 38 Md. 568; Warner v. New York Central R. Co., 44 N. Y. 465; Philadelphia City Pass. R. Co. v. Henrice, 92 Pa. St. 431. Nor can drunkenness be proved by the declarations of a third party. Lake Erie & W. R. Co. v. Zoffinger, 15 Am. & Eng. R. R. Cas. 871.

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### PENNSYLVANIA R. R. Co.

v.

### STATE OF MARYLAND TO USE OF MCGIRR et al.

(61 *Maryland Reports*, 108.)

A pedestrian in a city approached a railroad crossing, the view of which was obstructed, on a rainy day, holding an umbrella over his head and shoulders. He failed to stop, look, and listen, but walked directly upon the

track, where he was killed by a passing train. *Held*, that he had been guilty of such contributory negligence as to preclude recovery for his death; notwithstanding the fact that the railroad company was guilty of negligence in several respects.

Ferdinand Williams and William Walsh for the appellant.

William M. Price and Henry Kyd Douglas for the appellee.

YELLOTT, J.—This action was instituted for the benefit of the equitable plaintiffs, the widow and children of Arthur McGirr, who was killed on the 27th day of September, 1882, at the intersection of the Pennsylvania R. R. with Valley Street, in the city of Cumberland; the declaration averring that the defendant's locomotive, impelled at an unlawful rate of speed through a populous part of the town, was negligently and recklessly driven against the deceased, as he was lawfully and properly proceeding across the track of the railway to his place of business; thus crushing and instantly killing him by the collision. The ground of defence is contributory negligence on the part of the deceased.

The testimony, presented by the record, discloses the fact that the deceased, at the time of the fatal occurrence, was passing along Valley Street from his residence to his place of business, protected from the rain, which was falling, by an umbrella extended over his head and shoulders; and that, at the instant when he was about to cross the track of the railroad, he was crushed and killed by an engine operated by the agents of the defendant. The section of the city surrounding the scene of the collision is compactly built, and the street, along which the deceased was walking, is a frequented thoroughfare. The track of the defendant's road runs parallel with, and in close proximity to, that of the Cumberland & Pennsylvania R. R.; and at the locality, where the tracks of the roads are carried across the line of the street, a flagman, in the employ of the defendant, had his appointed station, and it was his especial duty to designate by signal the approach of the trains running over the rails of the road. The evidence adduced by the plaintiff tends to prove the absence of this watchman when the collision occurred; while that of the defendant shows that he was near his own house, but at some distance from the crossing. It is apparent that the usual intimation of danger was not given, and the watchman's statement that he called to the deceased is in conflict with the countervailing testimony of a witness, who says, that at the moment of the fatal catastrophe, she saw him coming from the garden adjacent to his house. This fact, as well as that in relation to the alleged intoxication of the deceased, is involved in obscurity by the doubts created by contradictory testimony.

The evidence shows that on both sides of the street, along which the deceased was walking, were houses, and from the house in contiguity to the track, on the side proximate to the approaching



train, was a fence which partially obstructed the view, and extended to a point almost in immediate contact with the exterior line of the road; there being an intervening space of only a few feet between the rail of the road and the extremity of the fence. There is evidence tending to show that at the place where the railroad has been constructed over the street its track is nearly hidden from view at all points below the house in which the watchman lives. There is evidence that the whistle was sounded and the bell rung as the train approached the crossing; the engineer saying that he saw the deceased when the locomotive was within eighty or one hundred feet of that point, and indicated the danger by sounding the whistle. This testimony is in apparent conflict with that of witnesses, who say that they heard no whistle sounded after the train passed a point near the cotton factory, situate at a distance of several hundred yards from the crossing. An ordinance of the city of Cumberland, offered in evidence, prohibits a rate of speed exceeding six miles an hour within the corporate limits. The engineer admits that the rate of speed was beyond the maximum designated by the ordinance, and other witnesses estimate the rapidity of the running to have been twenty miles an hour. It is proved by the plaintiff and admitted by the engineer on cross-examination, that immediately anterior to the occurrence of the accident, the engine had been detached from its train for the purpose of making a "running switch," which was a mode by which the cars, conveying the passengers and impelled by their own momentum, in the rear of the locomotive, were to be thrown upon a diverging track at a point some distance beyond the crossing.

The first question to be determined is that which is presented by the exception of the defendant to the rejection of its first, second, and third prayers. These prayers are based upon the assumption of the legal insufficiency of the plaintiff's evidence to support the action. The granting of these prayers by the court would have ended the controversy; and its refusal to give the instructions asked for presents an important question for determination.

In actions of this nature when the questions of fact are numerous, and many of them obscured by contradictory testimony, and thus involved in doubt, courts have never shown any disposition to ignore the legal maxim, *ad questiones facti respondent iuratores*. On the other hand, when there is some prominent fact in the cause, clearly ascertained, and conclusively demonstrating that the injury complained of was directly and proximately produced by the negligence of the injured party, it is the duty of the court to instruct the jury that there can be no recovery in the action.

In 39 Md. 449, it is said that "cases may and sometimes do occur, in which the uncontradicted evidence proves such a glaring

act of carelessness on the part of the plaintiff as to amount in law to contributory negligence, and in such it is the duty of the court, when requested, to decide the question without the intervention of the jury. But in no case ought the court to take the question of negligence from the jury unless the conduct of the plaintiff, relied on as amounting in law to contributory negligence, is established by clear and uncontradicted evidence." *McMahon v. North. Cent. Ry. Co.*, 39 Md. 449.

In 29 Md. 438, it is said that "Negligence is a relative term, and in cases of the character now before us, it is very much dependent upon the particular facts and circumstances of each case that occurs. What may be gross negligence in one case, may not be so in the light of the particular facts of another; and ordinary care in one state of case may be very gross negligence in another and a different case."

"The general rule is that negligence is a question for the jury to decide upon all the facts and circumstances of each case." *Pittsburg & C. R. R. Co. v. Andrews*, 39 Md. 343.

"Negligence is the absence of care according to the circumstances, and is always a question for the jury where there is reasonable doubt as to the facts, or as to the inferences to be drawn from them." *P. & R. Co. v. Killip*, 88 Penn. St. 412.

The determination of the question, presented in the cases just cited, necessitated the application of a principle which cannot be successfully controverted. As it is an ethical proposition, which carries with it an axiomatic force and cogency, that there can be no recognition of an abstract right or wrong, it is apparantly impossible to predicate negligence of any particular act, until the relation, in which it stands to its surroundings, has been clearly ascertained, and is fully comprehended. When a question of this nature is presented for solution in a judicial investigation the attendant facts and circumstances are to be sought for and discovered. If the circumstances, accompanying and characterizing the act, are removed from controversy by concession, or by the absence of contradiction, the calm scrutiny and acumen of a learned bench can readily reach the proper conclusions without the intervention and aid of a jury. But if the evidence in the cause is antagonistic and contradictory, and the facts and circumstances are obscured by a cloud of doubt, or even if the facts are ascertained, but sound and rational minds might deduce diverse conclusions from them, the case is clearly not one for the determination of the court. A trial of facts has become necessary, and the organic principles of our system of jurisprudence have devolved this important duty upon the jury, enlightened by the instructions of the court in relation to the legal principles applicable to the particular facts elicited, while analyzing the mass of evidence presented for their consideration, and dealing with the question of credibility.

In the argument of this cause the counsel for the plaintiff, with a zeal and eloquence always commendable when exerted in support of a client's claim to legal redress for alleged injuries, have earnestly contended that, if the Circuit Court had granted the first three prayers of the defendant, it would have excluded from the consideration of the jury a mass of evidence tending to prove gross negligence on the part of the agents of the company in charge of the train which crushed and killed the deceased. They strenuously urged that it was impossible to perceive negligence on the part of the deceased unless, under the circumstances, he could have seen or heard the approaching engine in time to avoid the collision; and that, on this point, the evidence was conflicting, and therefore clearly presented a question proper for the determination of a jury. With much cogency of argumentation it was contended that there was no conflict of testimony in relation to the fact that the train was being impelled at an unlawful rate of speed, nor that the cars had been uncoupled and were rapidly running by their own momentum in the rear of the engine; and that thus it might become apparent, to intelligent jurors, that if the engineer had arrested the progress of the locomotive when he saw the deceased, the train of cars would have collided with disastrous consequences. It was further urged that the statement of the engineer, that he saw the deceased when the locomotive was at a distance of about eighty or one hundred feet from the crossing, was suggestive of the inquiry, whether he had not then, by the unlawful rate of speed at which he was running, and by having uncoupled the train of cars, rendered it impossible for him to have stopped the engine and prevented the collision which caused the fatal catastrophe; and that this was manifestly a question for the consideration of a jury. It was asserted that the very act of making what is termed a "running switch" at a point in juxtaposition to a public crossing had been declared by judicial authority to be an act indicating the most culpable recklessness; and in support of this assertion a case, in 32 N. Y. 600 (*Brown v. N. Y. C. R.*), was cited, in which the learned Judge, who delivered the opinion, said:

"The act of making a running switch, to cut out of a long train a car to be left, and to bring the remaining portion of the train together while running at a rapid rate, evidently requires a good degree of care and skill; and if it is done over any public crossing, it must expose passers-by to more than ordinary danger. I am at a loss to see how the defendant could justify the selection of such a place for the performance of what, under the circumstances, appears to me to be so dangerous an act; and more particularly to see any ground on which a court could adjudge, as matter of law, that it was safe and proper, in such a locality, to make a running switch, whereby one train is detached into three parts, the two last propelled by their own momentum at a rapid rate, over a much

frequented thoroughfare, without signal or warning of any kind. In my judgment it was gross negligence, for which I should hesitate to say the company could not be held to a criminal responsibility."

In opposition to the instructions invoked by the defendant, it was further urged that it was in evidence that the train was running at the rate of twenty miles an hour, which fact would be, to the minds of intelligent jurors, suggestive of the hypothesis that had it been moving at the maximum speed, designated as lawful by the ordinance of the city, the ordinary gait of the deceased in walking might have carried him over the crossing and beyond the imminence of danger. And when he heard the whistle sounded, it might be asked, had he not reason to assume that the engineer was acting in conformity with legal obligations, and that, by walking at one half the speed prescribed by the ordinance for the running of the trains, he could cross the track without perilous exposure? And having been accustomed to see a flagman at his post, and giving intimations of approaching trains by the appointed signal, might not his absence have induced him to suppose that there was no cause for apprehension? This reasoning was supported by a citation from 56 N. Y. 543 (*Kessenger v. N. Y. & H. R. R. Co.*), where the court said that,

"Although it is not negligent for a railroad company to omit to keep a flagman, yet if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company."

It has been deemed proper to thus notice the able argument of the plaintiff's counsel in order that the ground which forms the basis of this opinion may be fully disclosed. No justification of the reckless conduct of the defendant is intended. On the contrary, that conduct must be characterized as exhibiting the grossest negligence, which, under other circumstances, might have devolved on the company a fearful responsibility. If at the moment when the engineer, by uncoupling the cars, had rendered it impossible to stop the train as he approached the crossing, a procession of people, as often occurs in towns and cities, had been moving along that frequented thoroughfare, those in front being impelled onward by the momentum imparted by the multitude in the rear, and thus, deprived of the volition necessary to control their movements, carried on the crossing, a frightful calamity, resulting in the destruction of many lives, might have been the direct and proximate consequence of the recklessness of the defendant's agents. This is unlike the case of a person attempting to cross the track of a railroad at a point where no public crossing has been established, and where the individual, having no right to cross, takes upon himself the hazard of the attempt. In such cases, as has been repeatedly said, the track itself is a warning of danger, and no other intima-



ROLLER

v.

SUTTER STREET R. R. Co.

*(Advance Case, California. December 15, 1884.)*

In an action against a street railroad company for killing a child of very tender years, as it was attempting to cross the street, the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the company in the management of the car, and that the person having care of the child took all proper precaution for its safety.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Freidenrich & Ackerman for the appellant.

Pillsbury & Titus for the respondent.

Ross, J.—Between two and three o'clock of the afternoon of Sunday, November 7, 1880, an infant child of the plaintiff, aged two years and seventeen days, was run over on Larkin Street, in the city and county of San Francisco, by a dummy engine of the defendant, and so injured that death resulted from the injuries within a few days. The action is by the father for damages for the loss of his child. The points made on appeal relate only to the giving and refusal to give certain instructions to the jury by the court below.

The parents of the child, with whom lived also the mother of the plaintiff, resided on Larkin Street. In rear of the residence was a yard inclosed by a fence, from which a door opened into an alleyway leading to Larkin Street, the door being kept closed. The child was accustomed to play in the yard, and the testimony in the case shows that he was never permitted to go upon the street or sidewalk unattended. In the afternoon in question the father and mother went out for a walk, leaving the child in charge of his grandmother, who was engaged in the kitchen, from which a door and window afforded an outlook upon the yard. By some means not appearing, the door leading from the yard to the alleyway became unfastened and the child escaped through it into the alleyway and thence to Larkin Street, and in attempting to cross the street, was run over by the dummy of the defendant.





but that she was in the exercise of ordinary care at the time of the accident; and, if this is not shown, it is immaterial that she was rightfully upon the defendant's grounds at the time.

CHAMPLIN, J.—This action was brought to recover damages for personal injuries received by plaintiff in attempting to cross defendant's railroad, and while so doing being run against by defendant's engine. It appears from the plaintiff's testimony that, on the eighteenth day of July, 1883, she was injured by defendant's engine while crossing the company's track from the slaughter-house of Hammond & Standish, near the Twentieth Street crossing. At this point defendant's tracks run nearly east and west. There were six tracks which passed the point where plaintiff was injured, and a track leading to an ice-house 225 feet west of Twentieth Street. The other six tracks are thus described: Commencing on the south, the first track is called No. 11; the next are called the south and north main tracks; north of these the tracks are numbered 1, 2, and 3. The main tracks were used for all passenger trains and freight business, and for the general working tracks to get in and out of the yard. At that time, defendants ran in and out over the main tracks about 60 passenger trains daily, and an equal number of passenger trains for light business, and also about 18 switch-engines constantly running in and out. The yard was being used at that time by the Michigan Central main line; the Detroit, Lansing & Northern; the Grand Trunk; the Flint & Pere Marquette; the Detroit & Bay City; and the Canada Southern railroads. At the Twentieth Street crossing defendant had a flagman, and sign-boards on the corner, containing the words: "No thoroughfare. The public are warned against walking on these tracks." Engines going east into the city for a train would run backwards, and switch-engines running one way would go backward, and the other way forward.

The plaintiff was sworn as a witness in her own behalf, and testified that her husband was employed by the defendant on the north side of the tracks described above, and that she had been accustomed to carrying her husband's dinner to him, and in doing so she went up by the slaughter-house, west, and then went across the tracks to the company's yards north of the railroad, between Twentieth and Foundry streets; that her husband had been employed by defendant for three months; that she always went the same way; that she was standing upon the south side of the track upon which the engine was running when she was struck; that there were cars ahead of her, and before she stepped out from behind these cars she stopped and looked, and listened, but did not see nor hear anything; that she could not see up the track far on account of the cars. On cross-examination she testified that she did not know, but she guessed she saw a sign painted in English on the corner of Twentieth Street, forbidding people to go on the



jured. The plaintiff's testimony also showed that, on account of a curve in the track to the west of where the accident happened, a person emerging from behind cars on track No. 1, on the south side of the main track, could see but a short distance in that direction.

The foregoing comprises substantially all the testimony relating to the manner in which the accident happened. It appears very plain that the plaintiff, by her own negligence, contributed to the injury. She voluntarily went into a place of great danger, of which she was fully aware. She says she was hit upon the right shoulder as she attempted to cross from the south to the north side of the tracks by an engine backing from the west, along the south main track. If this was so she must have been facing the engine at the time, and must have seen it approaching, unless she was guilty of the utmost heedlessness. Yet she says she did not see the engine coming. It appears from her statement that she stepped from behind the car on track No. 1, directly in front of the passing engine, or so near to it as to be struck by it. It does not help the plaintiff's case to show that she was rightfully on the defendant's grounds, or that defendant was guilty of negligence in not ringing the engine bell; or in running at a rate of speed prohibited by ordinance, if the plaintiff's negligence contributed to the injury. It was incumbent upon the plaintiff not only to show that the defendant was negligent, but that she was in the exercise of ordinary care. The testimony is conclusive against the plaintiff that she was not in the exercise of ordinary care.

It follows that the judge of the superior court committed no error in directing a verdict for defendant, and the judgment is affirmed.

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BALTIMORE AND OHIO R. R. Co.

v.

HOBBS.

(*Advance Case, Maryland. 1884.*)

The plaintiff, who was familiar with a railway crossing, drove rapidly towards it at a time when he knew an express train was due. The view was obstructed at the crossing so that a train on the road could not be seen by the plaintiff until he reached it, and even then but a short distance off. The flagman came out as he approached, held up his hands, and warned him not to come on; but plaintiff testified that he did not hear what he said. He did not stop on approaching the track, but merely slackened his speed and then drove on. The express train passed at high speed and without sounding any signal just as plaintiff was passing, struck the hind wheels of

his wagon, and threw him out, inflicting injuries. In a suit to recover for such injuries, *held*, that the plaintiff had been guilty of contributory negligence *per se*, and that a verdict should have been ordered for defendant and judgment entered thereon.

THE opinion states the facts.

John K. Cowen for the plaintiff in error.

John I. Yellott, R. R. Boarman, and John K. Scott for defendant in error.

STONE, J.—This was an action brought by the appellee to recover damages for the alleged negligence of the appellant by which the appellee was injured.

A turnpike road crosses the tracks of the railroad at right angles on the outskirts of the village of Elkridge, and it was at the point of intersection that the accident occurred. The appellee was driving in a wagon across the tracks of the appellant when the hind part of the wagon was struck by an express train running from Washington to Baltimore and the appellee injured. The verdict and judgment was for the appellee, and the railroad has brought the case here for review.

The appellant asked the court below to take the case from the jury because there was no legally sufficient evidence of negligence on the part of the appellant, and if there was, that the negligence of the appellee contributed directly to the injury.

This would be the practical effect of the appellant's seventh and eighth prayers. These prayers the court rejected, and the correctness of that ruling we will first consider.

Courts are always reluctant to withdraw a case from the consideration of a jury, and before they will do so they must assume the absolute verity of the whole evidence offered by the plaintiff. Looking exclusively to his side of the case they must assume every fact to which his evidence is given as established, however great may be the preponderance of the proof on the other side against it. To weigh conflicting evidence is the province of the jury and not of the court. But it is the duty of the court, when applied to for that purpose, to determine upon the legal sufficiency of the evidence, and if upon the assumption that the whole evidence of the plaintiff is true he has shown no case to entitle him to a verdict, it is the duty of the court to say so. In all actions the burden of proof is upon the plaintiff, and a case like the present is no exception to that rule. In an action for injuries the result of negligence, when the plaintiff has proved the negligence of the defendant, and the injury resulting therefrom, he has established a *prima facie* case. But it has been too firmly settled to be now even questioned that although the defendant may have been guilty of negligence, yet if the plaintiff himself was also guilty of negligence that contributed directly to the accident he cannot re-

cover. The proof of this contributory negligence may and generally does come from the defendant. But if the facts constituting contributory negligence are interwoven and mixed with the other facts offered in evidence by the plaintiff, it is the duty of the court to consider whether such facts, so offered in evidence by plaintiff, do make such a case of contributory negligence as to debar a recovery.

In the case before us some evidence was offered by the plaintiff of negligence on the part of the defendant in not blowing the whistle or ringing the bell as the train approached the crossing. The question, therefore, is narrowed down to this, whether the testimony offered by the plaintiff himself shows that by his own negligence he directly contributed to the accident; for if so he is not entitled to recover. To determine this question a reference to the leading facts shown by the plaintiff becomes necessary.

It is shown by the plaintiff that he is about twenty years of age, and had lived all his life within a mile of the crossing where the accident occurred. That he was familiar with the crossing, and had often crossed there; that he left home on the morning of the accident in order to take the express train at the Relay House, which is half a mile or more beyond the crossing, and that in order to do so he had to cross the tracks of defendant by the turnpike at Elkridge; that the train that the plaintiff desired to catch did not stop at Elkridge, but did stop at the Relay; that the plaintiff also knew that the train was due at the Relay somewhere between five and ten minutes of eleven o'clock A.M.; that the plaintiff was travelling in a wagon drawn by one horse, and that there were two other persons in the wagon beside himself; that when they were about two hundred yards from the crossing the plaintiff and his companion Kinsmore compared watches, and found it was then ten or eleven minutes of eleven; that owing to obstructions the plaintiff could not see the track until he reached the crossing, and that then he could see for about one hundred yards toward the west, whence the train was coming; that as he approached the crossing he did not stop, but slackened his speed for a few seconds to listen; that he did not see the train, did not hear it, and heard no bell or whistle, and did not see the flagman until his horse was on the track; that after he slacked up he drove on and upon the track at the rate of four or five miles an hour; that he could have seen the flagman three hundred yards from the crossing; that when he did see the flagman he had his hands raised, but he did not understand what he said.

Kinsmore, one of the plaintiff's witnesses, says that the flagman called out three times for them to stop; that as he approached the crossing, as he did not see the flagman nor the train, he thought he had better hurry up and cross; that he did not see the train until it was thirty or forty feet from the passenger room, which is





It will be observed that while the court does not in that case lay down as an unqualified rule that the traveller must in all cases actually stop to look and listen, the court does hold that he must at least look and listen, and that his failure to do so is negligence *per se*. In this case the first and one of the most important facts to be noticed in determining the conclusions to which the plaintiff's evidence leads us is the knowledge of the plaintiff himself of the time of the running of the train, coupled with his knowledge of the time it was due when he attempted to cross the track. He tells us explicitly that the train was due at the Relay House somewhere between five and ten minutes before eleven o'clock A.M., and that when he was two hundred yards from the crossing it wanted ten or eleven minutes of eleven.

Giving him the advantage of the most favorable construction of his testimony it wanted eleven minutes to eleven when he was two hundred yards from the crossing. As the train might arrive at the Relay half a mile or more beyond the crossing at ten minutes before eleven, it is evident that the train might momentarily be expected at the crossing and that he knew it. With this knowledge he drove, without stopping, straight upon the track at the speed of four or five miles an hour. The object of all warnings by bell, whistle or flagman is to convey to the traveller knowledge of the approach of the train. To one who has full knowledge of the schedule time upon which the train is run, such knowledge may well supply the place of the ordinary warnings.

The next material fact for us to notice is, that according to his testimony, the plaintiff could see the track before he reached the freight-house about fifty yards to the right (the side on which the train came), and at the crossing any one could see it for one hundred yards; that except at these points the view is obstructed. But there is no evidence whatever that the plaintiff looked for the train where it could be seen. But there is clear evidence that he did not, for he says that when about thirty, forty, or fifty feet from the track he slackened up, not to look, because he had no view from that point, but to listen. But that when he got to the railroad he did look but did not see the train until it was within about fifty feet from the crossing. He says that when he first saw the train it was thirty or forty feet from the passenger-room, and as the passenger-room is twelve or fifteen feet from the turnpike, it follows that he first saw the train when it was about fifty or fifty-five feet from him. But he says that the track could be seen for one hundred yards, and the only possible reason that he did not see it until it was within about fifty feet of him must have been because he did not look. He who can see but does not, should be treated as if he did see. The track was a double one, and the one on which the train was approaching was the one furthest from the plaintiff, and he had ample space, after reaching the crossing, to

his wagon, and threw him out, inflicting injuries. In a suit to recover for such injuries, *held*, that the plaintiff had been guilty of contributory negligence *per se*, and that a verdict should have been ordered for defendant and judgment entered thereon.

THE opinion states the facts.

John K. Cowen for the plaintiff in error.

John I. Yellott, R. R. Boarman, and John K. Scott for defendant in error.

STONE, J.—This was an action brought by the appellee to recover damages for the alleged negligence of the appellant by which the appellee was injured.

A turnpike road crosses the tracks of the railroad at right angles on the outskirts of the village of Elkridge, and it was at the point of intersection that the accident occurred. The appellee was driving in a wagon across the tracks of the appellant when the hind part of the wagon was struck by an express train running from Washington to Baltimore and the appellee injured. The verdict and judgment was for the appellee, and the railroad has brought the case here for review.

The appellant asked the court below to take the case from the jury because there was no legally sufficient evidence of negligence on the part of the appellant, and if there was, that the negligence of the appellee contributed directly to the injury.

This would be the practical effect of the appellant's seventh and eighth prayers. These prayers the court rejected, and the correctness of that ruling we will first consider.

Courts are always reluctant to withdraw a case from the consideration of a jury, and before they will do so they must assume the absolute verity of the whole evidence offered by the plaintiff. Looking exclusively to his side of the case they must assume every fact to which his evidence is given as established, however great may be the preponderance of the proof on the other side against it. To weigh conflicting evidence is the province of the jury and not of the court. But it is the duty of the court, when applied to for that purpose, to determine upon the legal sufficiency of the evidence, and if upon the assumption that the whole evidence of the plaintiff is true he has shown no case to entitle him to a verdict, it is the duty of the court to say so. In all actions the burden of proof is upon the plaintiff, and a case like the present is no exception to that rule. In an action for injuries the result of negligence, when the plaintiff has proved the negligence of the defendant, and the injury resulting therefrom, he has established a *prima facie* case. But it has been too firmly settled to be now even questioned that although the defendant may have been guilty of negligence, yet if the plaintiff himself was also guilty of negligence that contributed directly to the accident he cannot re-

cover. The proof of this contributory negligence may and generally does come from the defendant. But if the facts constituting contributory negligence are interwoven and mixed with the other facts offered in evidence by the plaintiff, it is the duty of the court to consider whether such facts, so offered in evidence by plaintiff, do make such a case of contributory negligence as to debar a recovery.

In the case before us some evidence was offered by the plaintiff of negligence on the part of the defendant in not blowing the whistle or ringing the bell as the train approached the crossing. The question, therefore, is narrowed down to this, whether the testimony offered by the plaintiff himself shows that by his own negligence he directly contributed to the accident; for if so he is not entitled to recover. To determine this question a reference to the leading facts shown by the plaintiff becomes necessary.

It is shown by the plaintiff that he is about twenty years of age, and had lived all his life within a mile of the crossing where the accident occurred. That he was familiar with the crossing, and had often crossed there; that he left home on the morning of the accident in order to take the express train at the Relay House, which is half a mile or more beyond the crossing, and that in order to do so he had to cross the tracks of defendant by the turnpike at Elkridge; that the train that the plaintiff desired to catch did not stop at Elkridge, but did stop at the Relay; that the plaintiff also knew that the train was due at the Relay somewhere between five and ten minutes of eleven o'clock A.M.; that the plaintiff was travelling in a wagon drawn by one horse, and that there were two other persons in the wagon beside himself; that when they were about two hundred yards from the crossing the plaintiff and his companion Kinsmore compared watches, and found it was then ten or eleven minutes of eleven; that owing to obstructions the plaintiff could not see the track until he reached the crossing, and that then he could see for about one hundred yards toward the west, whence the train was coming; that as he approached the crossing he did not stop, but slackened his speed for a few seconds to listen; that he did not see the train, did not hear it, and heard no bell or whistle, and did not see the flagman until his horse was on the track; that after he slacked up he drove on and upon the track at the rate of four or five miles an hour; that he could have seen the flagman three hundred yards from the crossing; that when he did see the flagman he had his hands raised, but he did not understand what he said.

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running or flying switch, and permitting a detached car to pass over a crossing, is a fruitful source of disasters; and in this case it is a fair inference from the evidence that the company was guilty of negligence in so doing. The negligence of the company being established, we are to consider whether Mrs. Thomley exercised ordinary care to avoid the collision; if she was guilty of contributory negligence the plaintiff cannot recover in this action. Persons living in the vicinity of railroads who use the tracks or the embankments, or the space between the tracks, as a foot-path, are wrong-doers, unless permission is granted by the company so to use its tracks. Although pedestrians, or the public generally, travel over them without objection, people go there at their own risk, and, as said by the supreme court of Massachusetts, "enjoy the license subject to the perils." *Gaynor v. Old Colony R. Co.*, 100 Mass. 208.

If the collision had occurred while Mrs. Thomley was on the right of way below Fourth Street, she undoubtedly would have been guilty of contributory negligence, and could not recover. Was she free from negligence because Fourth Street had been reached and she had just passed the line of the street when killed? I have considered this evidence carefully, giving it full weight, and am forced to the conclusion by the facts and the law applicable thereto, that she was guilty of contributory negligence. She had reached a dangerous position upon the street, which resulted in her death and that of the child. It was voluntarily assumed. She placed herself in a position of danger by walking up the tracks of the defendant, in front of an approaching car, in full view of her. If she had passed to the left of the low embankment thrown up by the defendant in grading for the new track, she would have escaped all danger; but she passed on, without taking heed of the approaching car, and met her death.

While a railroad company is held to the highest degree of care in operating its road, and is liable for all injuries that result solely from a failure to exercise such care, persons who take the risk and perils of travelling upon railway tracks, and are thus brought into dangerous positions, voluntarily assumed, are not free from fault, and if injury results therefrom the company is not liable.

In the case of Mary Thomley the motion will be granted. In the case of the administrator of the child, Anna Thomley, against the railroad company, the negligence of the mother being imputed to the child, bars a recovery in that case.

## EAST TENNESSEE, V. A. AND GEO. R. R. Co.

v.

CLARK.

(74 *Alabama Reports*, 448.)

In an action against a railroad company, to recover damages for personal injuries at a railroad crossing, a charge which states the correct rule as to negligence, but ignores the evidence tending to show contributory negligence, is not therefore erroneous; the question of contributory negligence being defensive in its character, and properly calling for an explanatory charge.

## APPEAL from the Circuit Court of Talladega.

This action was brought by Israel H. M. Clark against the appellant, a corporation created under the laws of Alabama and Tennessee, to recover damages for personal injuries caused by being knocked down and run over by one of the defendant's trains of cars, on the night of March 26th, 1881, whereby his right hand was mashed, and so badly injured that several of his fingers were necessarily amputated; and was commenced on the 14th March, 1882. The defendant pleaded not guilty, "in short by consent," and a special plea averring contributory negligence on the part of the plaintiff; and issue was joined on both of these pleas. At the time the accident occurred, the plaintiff was returning from Talladega to his home in Clay County, and was camping for the night, with Ben Clemens and wife, near the railroad at "Parsons' Crossing;" he had been driving a wagon drawn by three oxen, and, in unyoking them, one of the oxen got loose, and crossed the railroad track. The plaintiff, testifying as a witness for himself, thus described the accident: "I went in pursuit of the ox, and found him 50 or 75 yards beyond the railroad, in the public road. I got the ox, and caught hold of the line on his head, and drove him back to the railroad. When I got to the railroad, I did not see the train at all, until it was right on me, and knocked me down. I saw the ox jump, and then the train ran over me, and cut off my hand. I was knocked senseless, and did not know anything more until the doctor was standing over me. After we stopped to camp, a train went down towards the depot, which had its head-light burning, and which rang the bell as it approached the crossing. The train that struck me was going north, and had no head light burning, and did not ring the bell, nor blow the whistle, when approaching the crossing. I heard a train rattling and running just as I approached the track, but thought it was the train at the depot. I did not stop as I approached the railroad track. I did not see the train until it was right at me and knocked me down. It was dark at the time. I



don't know the hour of the night when it happened. We did not stop, from the time we left the depot until we got to the said crossing. We went up there for the purpose of hunting a place to camp. It was about a half-mile from the depot." The plaintiff introduced other witnesses, who testified that, at the time of the accident, the head-light of the engine was not burning, and that the bell was not rung, nor the whistle blown, as the train approached the crossing; but the defendant's witnesses contradicted them on both of these points.

The court gave the following (with other) charges to the jury, at the instance of the plaintiff: 2. "To approach a public road crossing at night with a train or engine, without a head-light, or without ringing the bell, or blowing the whistle, as required by law, is reckless; and if the jury find, from the evidence, that the defendant did this by its servants, then they were guilty of reckless conduct; and if thereby the plaintiff was injured at such crossing, the defendant is guilty." 3. "The rights and duties of the railroad company and the plaintiff, at a public crossing, are clearly defined by law, and neither party has the right to disregard them. The railroad company is required to ring the bell, or blow the whistle, whether day or night, one quarter of a mile from the crossing, and to continue to do so until the crossing is passed, and is also required to keep good lights on their trains at night; and if the jury believe, from the evidence, that the plaintiff was injured while endeavoring to cross the defendant's railroad, between eight and nine o'clock at night, at a public crossing, in March, 1881, and at the time the railroad company did not have good lights on the train, as required by law, then the company was guilty of negligence; and if, by reason thereof, plaintiff did not discover the train until it was close to him, so that he could not get out of the way by the use of reasonable diligence on his part, then he is entitled to recover such damages as the evidence satisfies the jury he has sustained." 4. "Gross negligence on the part of the railroad company consists in not doing those things which the law requires it to do." 5. "The defence of contributory negligence is not made good, if the plaintiff, after contributing by his own negligence to place himself in peril, employs proper diligence to extricate himself, and the defendant neglects to use diligence which might have prevented the catastrophe." 8. "In the employment of steam as a motive power, railroad companies are held to the exercise of extraordinary diligence; and although the jury may believe that the plaintiff was imprudent in the first instance, in getting on the track, yet, if he made all proper efforts to escape when the danger became apparent, and the servants of the railroad company failed to use all the proper means in their power, by turning on brakes, and reversing the engine, by which the danger might be avoided, the railroad company will be responsible, and such original contributory negligence, if

shown, is no defence to the action. It is not essential for the plaintiff to show that the engineer perceived the obstruction, if it is shown that he or his steer, or both, were on the track, and could have been seen by the exercise of due diligence, with proper headlight." The defendant excepted to each of these charges, and now assigns them as error.

STONE, J.—In the argument of counsel it is contended, that the Circuit Court erred in giving each of the charges numbered 2, 3, 4, 5, and 8. We do not think there is reversible error in either of these charges. If there was evidence tending to show contributory negligence (we do not decide that there was such evidence) that would present a phase of the question defensive in its character, and, at most, would call for an explanatory charge. To put the court in error, such charge must be asked by the party who conceives himself aggrieved by the court's rulings. These principles have been so often declared, that it is needless to cite authorities, other than those noted on the brief of counsel.

The judgment of the Circuit Court is affirmed.

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HOYE, etc.,

v.

CHICAGO AND N. W. RY. CO.

(*Advance Case, Wisconsin. March 31, 1885.*)

In an action for an injury to a person on a railroad crossing it is only when the inference of negligence or contributory negligence, or the absence thereof, is necessarily deducible from the undisputed facts and circumstances proved, that a court is justified in taking the case from the jury; and if such facts and circumstances, though undisputed, are ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, might disagree as to the inference or conclusion to be drawn from them, the case should be submitted to the jury. Nonsuit held improperly granted.

APPEAL from county court, Milwaukee County.

In the Third Ward of Milwaukee, Buffalo Street runs east from Milwaukee River to Lake Michigan. Four side tracks of the defendant run north and south across that street at right angles with it, each terminating at the bumpers 232 feet north of the sidewalk on the north side of that street. These side-tracks were numbered consecutively, from the east westward, 8, 9, 10, and 11, respectively, so that the east side track was known as

No. 8, and the west side track No. 11. Immediately east of side track No. 8, and parallel with it, was Van Buren Street, about 11 rods west of side track No. 11, and parallel with it was Jackson Street. These streets and side tracks were all so located at the time of the injury which caused the death of the intestate. The ends of the side tracks north of Buffalo Street were used for storing freight cars, etc. The entire length of these freight cars and coupling, respectively, was about 31 feet.

On the evening of July 16, 1883, there were two freight cars standing on side track No. 10, north of Buffalo Street, and up rear, or at the bumpers. About half past 10 o'clock on that evening the defendant's servants backed a freight train, consisting of 10 or 12 freight cars, with an engine at the south end thereof, from the south upon side track No. 10, with a view of leaving the rear four freight cars of the train north of Buffalo Street, on the same side track with the other two freight cars then standing thereon. The evidence tends to show that when the train had backed so far north that the rear five cars of the train had passed north of Buffalo Street, the rear four of the cars became uncoupled, and the balance of the train started south; that the deceased was killed at or near where the sidewalk on the north side of Buffalo Street crossed side track No. 10, by the movement of the train; that about the time named, the deceased started from her sister's, two and one half blocks northeast of the place of the accident, for her home on Jackson Street, southeast of the place of the accident; that there was a good deal of travel on Buffalo Street; that no bell was rung, no light or other signal on the rear end of the train, and no guard at the crossing at the time the train backed over the street; that there was at the time no street light in the vicinity except a gas-lamp at the northwest corner of Buffalo and Jackson streets, 243 feet distant from the place of the accident; that the side track No. 10 descended from said sidewalk north to the bumpers; that at the time of the accident there was water over the ties immediately north of that sidewalk; that there was no water on the pavement of the street or sidewalk where the accident occurred; that the deceased was found with her head between the two west wheels of the forward truck of the hind car, as it started south, nearly severed from the body, which was south-east of the head; that the clothing on her right side, though dry when she started home just before, was saturated with water; that the body had been dragged along the track to the place where it was found, from a point about two and a half feet south of the north line of the sidewalk, a distance of about 20 feet; that the break-rod or break-beam, under the car that did the killing, was elevated 11 inches above the top of the rails, and 15 inches above the ties north of that sidewalk; that where that sidewalk crossed track No. 10, it was planked up nearly or quite level with the top of the

rails, so that the break-rod at that point was only 11 or 12 inches above the plank.

This action is brought under the statute to recover damages for her death. On the trial the plaintiff was nonsuited on his own showing, and from the judgment entered thereon he brings this appeal.

N. S. Murphy for appellant.

Jenkins, Winkler & Smith for respondent.

CASSODAY, J.—If the deceased came to her death through the neglect of the defendant to ring the bell, or give other requisite signal, before and while the train was crossing the street, without any contributory negligence on her part, then the defendant would be liable. Section 1809, Rev. St.; *Bohan v. Railway Co.*, 58 Wis. 30; s. c., 15 Am. & Eng. R. R. Cas. 374. The theory of the defence is that the train backed up until the front end of the fifth car from the rear was at or near the north line of the sidewalk in question, when it stopped to uncouple the rear four cars, and that while standing in that position the deceased came along on the sidewalk from Van Buren Street to the place where the train was so standing, and then undertook to pass through under the draw-bar between the front end of the fifth car and the one ahead of it, and while in the act of so doing, the train started south, and she was caught under the fifth car and killed as stated.

The evidence tends to show that the draw-bar was about 31 inches above the rails. If this theory is conclusively established by the evidence, then there can be no question but what the deceased was guilty of contributory negligence, and hence that the nonsuit was properly granted. The difficulty in sustaining this theory is the absence of any direct evidence as to the precise part of the train with which she first came in contact, or which way the train was moving at the time, or the manner in which she so first came in contact with the train. In support of this theory, the defendant seems to rely upon these circumstances: (1) It was the forward west wheel of the fifth car from the rear of the original train, or the rear car of the balance of the train (after the four had been uncoupled), that ran over her. (2) A witness on the northwest corner of Buffalo and Jackson Streets, 243 feet from the place of injury, and another witness sitting on the stoop of the house on the southwest corner of the same streets, each saw the train back up over the street, and then stop, and suddenly start back south, and then heard two screams, about two seconds apart, in quick succession from the place of the accident, and that the first scream was not heard until after the train had started south. (3) The witness on the northwest corner of Buffalo and Jackson Streets stood at or near the gas-light, and testified that he saw the hind end of the train as it backed up over the sidewalk; that

he could see along the sidewalk to the end of the train and beyond it; and that he saw no one. But these are not the only features of the evidence, as will appear from the foregoing statement. There are still other items of evidence not there stated. Both of the two witnesses just referred to agree in stating that the stoppage for uncoupling was very short,—not more than two seconds,—and that the train had started south before they heard the first scream, and one of them said that the train had moved from 7 to 10 feet before he heard the scream. The witness on the southwest corner of Buffalo and Jackson streets said he could not have seen any one at the time, at the place of the accident, unless the person had had a lantern. Two witnesses in a house fronting the south on Buffalo Street, and only 60 feet west of the place of the accident, testified, in effect, that at the time they heard three screams from the place of the accident, and that the two last were in quick succession; but that the first was a shriek, and somewhere from a half a minute to two minutes before the second scream.

It appears from the measurements made that if the train backed clear up to the south car standing upon the track, and the car north of it was up against the bumpers, then, when the train stopped, the front of the end car which finally did the killing was over 16 feet north of the north line of the sidewalk. The fact that when found her clothing on one side was saturated with water, and that fragments of her clothing were found on the plank and pavement for the distance of 20 feet, where she had apparently been dragged by the car, and that the brake-rod was about 15 inches above the ties while that car was north of the sidewalk, and only 11 or 12 inches above the plank and pavement when it reached them, with the other facts and circumstances stated, are urged as evidence to support the plaintiff's theory, which is, in effect, that the deceased reached that part of the sidewalk covered by track No. 10 just as the rear end of the train, backing north unobserved, approached her and pushed or knocked her off into the water, between the rails, immediately north of the north line of the sidewalk; and that, stunned by the occurrence, or otherwise, she there remained while the five cars were backed over her, and that when the train started back she was caught by the brake-rod, or some other projection on the under side of the car, and dragged up out of the water on to the plank, and from thence on to the pavement; and that the first scream mentioned was when she was first struck by the rear end of the rear car; and that the last two screams occurred after she was so caught, and while the train was moving south. The features of this theory most strongly urged, are the evidence of her utterance of three screams, and the comparatively long interval between the first and the second scream, and the fact that a portion of her clothes were saturated with water.

For the purpose of accounting for the wet clothing, it might, perhaps, be urged, even upon the defendant's theory, that the deceased attempted to go through between the cars, under the draw-bar, while the front end of the car was a few feet north of the north line of the sidewalk. The difficulty here confronting us is whether the court, as a matter of law, under all the facts and circumstances disclosed in the evidence, had the right to adopt, as conclusively proved, the defendant's theory, or any other theory, holding the deceased guilty of contributory negligence, or whether that question, after all, should not have been submitted to the jury. In determining that question we must assume that all of the evidence given in this case would have remained undisputed, and then we must give to all the facts and circumstances the construction most favorable to the plaintiff that they will legitimately bear, including all reasonable inferences to be drawn from them. *Spensley v. Insurance Co.*, 54 Wis. 433; *Sabotta v. Insurance Co.*, 54 Wis. 687; *Hill v. City of Fond du Lac*, 56 Wis. 246; *Johnson v. Railway Co.*, 56 Wis. 282; *Fitts v. Railway Co.*, 59 Wis. 325: & c., 15 Am. & Eng. R. R. Cas. 462; *Nelson v. Railway Co.*, 60 Wis. 323.

Upon such assumption and construction we must, in order to justify the nonsuit, be able to say that such facts and circumstances were not ambiguous, and that there was but one honest and apparently reasonable conclusion to be drawn from them, and that was in harmony with the theory of the defence. *Id.* It is only when the inference of negligence, or the absence of it, is necessarily deducible from the undisputed facts and circumstances proved, that the court is justified in taking the case from the jury. *Id.* If, on the other hand, such facts and circumstances, though undisputed, were ambiguous, and of such a nature that reasonable men, unaffected by bias or prejudice, might have disagreed as to the inference or conclusion to be drawn from them, then the case should have been submitted to the jury. *Kaples v. Orth*, 21 N. W. Rep. 633; *Nelson v. Railway Co.*, 60 Wis. 324; *Hill v. City of Fond du Lac*, 56 Wis. 246. These rules of law are applicable to contributory negligence as well as negligence. We have purposely refrained from expressing any opinion as to the plausibility of either of the respective theories, or any theory, because, in our judgment, under the rules of law stated, it was for the jury, and not for the court, to determine whether the deceased was guilty of contributory negligence.

For the reasons given the judgment of the county court is reversed, and the cause is remanded for a new trial.



COREY

v.

NORTHERN PACIFIC R. CO. .

*(Advance Case, Minnesota. November 29, 1884.)*

The tracks of a railroad company ran across a certain street. There was a ditch between the tracks crossed by a bridge the width of the street only. A box car was left on the track at the crossing so as to obstruct the same, there being about four feet of space only left between the end of the car and the uncovered ditch. A party approached the crossing with a sleigh and attempted to ride around the end of the box car, forgetting the existence of the ditch which was full of snow. His horse fell in and was injured. In an action against the company to recover damages, *held*, that the question of the plaintiff's contributory negligence was properly left to the jury.

APPEAL from an order of the district court of Clay County.  
Spooner & Larrabee for respondent, Orville S. Corey.  
Edward H. Ozman for appellant, Northern Pacific R. Co.

GILFILLAN, C. J.—In the village of Glyndon there is a public highway called Park Avenue, running north and south. It is crossed by the main track and a side track of defendant, running east and west, the side track being about thirty feet south from the main track. Along the side of the highway, between the tracks, was a ditch about four feet deep. On the night of December 17, 1882, the defendant's employees left a box car on the side track, across the highway, so as to obstruct it, except for a space of about four feet between the end of the car and the ditch. At six o'clock the next morning the driver of plaintiff's horses, attached to a sleigh, was driving along the highway from north to south, and reached and crossed the main track just before a train on that track crossed the highway. In approaching on the highway the main track from the north, the view in the direction from which the train came was somewhat obstructed by an old depot, or warehouse, though, had he been looking in that direction, he might have seen the train. He did not see the box car till he was on the main track. After crossing the main track, thinking it not safe to stand with the team between that track, with the train passing on it, and the box car, he attempted to pass on by driving around the end of the box car, he not knowing, or not recollecting, that the ditch was beside the highway, and it being filled even full with snow, so that in the darkness he did not see it, and one of the horses fell into the ditch and was injured. On these facts it was for the jury to say whether there was negligence on the part of the driver contributing to the injury. Order affirmed.

## SCHOFIELD

v.

CHICAGO, M. AND ST. P. RY. CO.

(114 *United States Reports*, 615.)

Where a person, in a sleigh drawn by one horse, on a wagon road, approaching a crossing of a railroad track, with which he was familiar, could have seen a coming train, during its progress through a distance of 70 rods from the crossing, if he had looked from a point at any distance within 600 feet from the crossing, and was struck by the train at the crossing and injured, he was guilty of contributory negligence, even though the train was not a regular one, and was running at a high rate of speed, and did not stop at a depot 70 rods from the crossing in the direction from which the train came, and did not blow a whistle or ring a bell between the depot and the crossing. On these facts, it was proper for the trial court to direct a verdict for the defendant.

In error to the Circuit Court of the United States for the District of Minnesota.

John B. Sanborn and S. L. Pierce for plaintiff in error.

Chas. E. Flandrau for defendant in error.

BLATCHFORD, J.—This is an action brought by William R. Schofield against the Chicago, Milwaukee & St. Paul Ry. Co., in a state court of Minnesota, and removed by the defendant into the circuit court of the United States for the district of Minnesota. It was tried before a jury, and, after the plaintiff had rested his case, the jury, under the instruction of the court, rendered a verdict for the defendant. The suit was one to recover damages for personal injuries to the plaintiff, caused by his being struck by a train running on the railroad of the defendant, while the plaintiff, in a sleigh drawn by one horse, was endeavoring to cross the track, on the thirteenth of February, 1881, at Newport, in Minnesota. The train was running north, on the east bank of the Mississippi river, through Newport, to St. Paul, about 4 o'clock in the afternoon, in daylight, on Sunday. The track was straight from the crossing to a point 2320 feet south of it, and the country was flat and open. The plaintiff was himself driving, with a companion in the sleigh, in a northerly direction, on a wagon road which ran in the same general course with the railroad, and to the west of it, and attempted to cross it from the west to the east, as the train approached from the south. The crossing was 70 rods to the north of the depot at Newport. Opposite the depot, the wagon road was 280 feet distant to the west of the depot. The plaintiff had a slow horse, and was following the beaten track in the snow.

When he arrived at a point in the wagon road 600 feet from the crossing, he could there, and all the way from there till he reached the crossing, have an unobstructed view of the railroad track to the south, and of any train on it, from the crossing back to the depot; and, when he reached a point in the wagon road 33 feet from the crossing, he could have an unobstructed view to a considerably greater distance southward beyond the depot. The evidence shows that, if the train had passed the depot when the plaintiff was at a point 600 feet, or any less number of feet, from the crossing, he could not have failed to see the train, if he had looked for it; and that, if the train had not reached the depot, when the plaintiff arrived at a point 33 feet from the crossing, he could not at that point, or at any point in the 33 feet, have failed to see the train beyond and to the south of the depot, if he had looked for it. When the train passed the depot the plaintiff was at least 100 feet from the crossing. The train consisted of a locomotive engine and seven or eight cars. The engine whistled at a point 4300 feet south of the depot, which was the whistling place for that depot. The wind was blowing strongly from north to south. The man in company with the plaintiff was killed by the accident, as was the horse. The plaintiff resided in the neighborhood, and was familiar with the crossing. After the accident, the men, horse, and sleigh were found on the west side of the railroad, showing that they had been struck as they were entering on the crossing. The train was not a regular one, and no train was due at the time of the accident; it was moving at a high rate of speed; it did not stop at the depot; and it gave no signal by blowing a whistle, or ringing a bell, after it passed the depot.

The ground upon which the circuit court directed a verdict for the defendant (2 McCrary, 268; s. c., 8 Fed. Rep. 488) was that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test that, if it would be the duty of the court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co. v. Stead*, 95 U. S. 161, and especially in *Railroad Co. v. Houston*, Id. 697, and arrived at the conclusions of law that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the

neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to. In *Railroad Co. v. Houston* it was said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees, in these particulars, was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant." The court added that an instruction to render a verdict for the defendant would have been proper. Those views concur with those laid down by the Supreme Court of Minnesota in *Brown v. Milwaukee Ry. Co.*, 22 Minn. 165, and are in accord with the current of decisions in the courts of the States. It is the settled law of this court that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. v. Munson*, 14 Wall. 442; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Baltimore & Ohio R. Co.*, 109 U. S. 478; s. c., 15 Am. & Eng. R. R. Cas. 243; *Anderson Co. Com'rs v. Beal*, 113 U. S. 227; *Baylis v. Travelers' Ins. Co.*, 113 U. S. 316. This rule was rightly applied by the circuit court to the present case.

Judgment affirmed.

CHASE  
v.  
MAINE CENTRAL R. R. Co.

*(Advance Case, Maine. February 4, 1885.)*

Where an accident occurs to a party at a railroad crossing whereby he is killed, and no one is a witness of the accident, it is error to allow evidence of the general character of the deceased for carefulness in order to negative contributory negligence.

It is error for the court in such case to charge the jury that they may take into consideration, upon the question of the intestate's care upon the occasion of the injury, their knowledge of the habits of thought and mind, and the natural instincts of men to preserve themselves from injury.

PETERS, C.J.—The intestate's sleigh collided with a train at a railroad crossing. He thereby received an injury and very soon afterwards died. He never was conscious enough after the injury to tell how the accident happened; no one was with him at the time; no one saw him at the moment of the collision. As evidence that he could not have been guilty of any negligence which contributed to the accident, witnesses who had been his neighbors for some time were permitted to testify to their opinion of his general character for carefulness. We think this was overstepping the limit allowed to collateral evidence in this State. We dare not abide by it. Our belief is that such a rule would be fraught with much more evil than good.

It was said in *Eaton v. Telegraph Co.*, 68 Maine, 63, 67, that "the best authorities clearly sustain the doctrine that the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion." See cases there cited. If in civil cases a person's character proves carefulness in one instance, why not in all instances? Where and how can a true line of distinction be drawn? If by such proof a plaintiff can be shown to have been careful in one case, why not by the same mode of proof show that a person acted carefully or carelessly in any case—in all cases? In many litigations under such a test, there would arise a wager of character which would as unfairly settle the dispute as did formerly the wager of battle.

If the intestate's general character for care be in issue, why not that of the engineer and of every man concerned in the management of the train? If a man who is customarily careful were always so, there would be reason for admitting the evidence. But the issue is whether the intestate was careful in this particular instance,—a fact to be, either directly or circumstantially, affirma-

tively proved. The objection to such a method of proof is augmented by the fact that the testimony consisted merely of the opinions of neighbors—one generality proving another. But upon what tests or what definition of care are their opinions grounded? The question was not whether the intestate managed his farm or his shop or his horses carefully, but whether he used due care in attempting to cross a railroad track at the very moment when a regular train was due at the crossing. The law imperatively demands that a traveller look and listen before crossing if there is any opportunity to do so. What did those former witnesses know about the intestate's habitual care in that respect? It is not a ground for the admission of this evidence that the plaintiff can produce no other. It is neither of primary nor secondary importance; it is not evidence at all. 1 Greenl. Ev. § 84.

The question is not a new one in this court. The sole question considered in the case of *Scott v. Hale*, 16 Maine, 326, was whether similar evidence was admissible. The defendant there was sued for damages for the loss of a building by fire, the allegation being that the fire was occasioned by the negligence of the defendant. In that case the same arguments were presented as here. The evidence received in that case came nearer the point at issue than the evidence here. At the trial the court permitted witnesses to testify that the defendant was very careful with fire, and that they never discovered any carelessness in him about taking care of his fires during the time they were at his house, just before the event complained of. It was held that the evidence was inadmissible, and the verdict was set aside. The same rule has been maintained in subsequent cases. *Lawrence v. Mt. Vernon*, 35 Maine, 100; *Dunham v. Rachliff*, 71 Maine, 345. The case of *Morris v. East Haven*, 41 Conn., cited by the defendants, is an especially pertinent and sustaining decision. See *Baldwin v. Railroad*, 4 Gray, 333.

Exception is taken to the judge charging the jury to take into consideration, upon the question of the intestate's care upon the occasion of the injury, the knowledge of the jury "of the habits of thought and mind, and the natural instincts of men" to preserve themselves from injury. Following, as no doubt it did, an impressive argument of counsel that a man would not be so unwise as to rush into danger when it was avoidable, we are inclined to think the idea intended was presented to the jury too prominently. Such a consideration is by no means evidence, for if it were so, a jury might accept it as conclusive evidence. It is no more than an accompaniment or an appurtenance of evidence. It may have some influence upon the interpretation of facts affirmatively presented. It pertains, as said by defendants' counsel, to those natural laws in connection with which all evidence may be weighed. It belongs to the class of slight presumptions



described by Mr. Best, which, "taken singly, do not either constitute proof or shift the burden of proof." 1 Best Ev. § 319. It may give character or force to facts already proved, but it does not of itself add or create proof. It is rather an argument or mode of reasoning upon evidence. Practically speaking, it is no more than that a person's motive may be taken into consideration in relation to any act done by such person. It would be reasonable to say that a man would be naturally stimulated to avoid rather than to rush into dangerous situations. He would be impelled by strong motives to do so. But this would apply to the engineer or fireman or brakeman on a train as well as to the traveller, although perhaps not generally in the same degree.

But the weakness of the plaintiff's position lies in the fact that this motive for personal safety does not operate upon the minds of men until they can clearly see that they are endangered by their carelessness. It does not keep them from careless acts. The danger is often not seen until too late to be extricated from it. The careless act usually precedes the moment when the natural instincts for self-preservation are aroused.

And a man is quite prone to take risks. A man is careless to take a risk in crossing a railroad in advance of a coming train. We all know that he often does it. There is no doubt that the intestate was impelled by all his instincts and love of life to save himself when he saw that the horrible danger was upon him; but how the unfortunate man got into the awful situation no one seems to know and no evidence explains to us. It seems to be an unexplained catastrophe.

Other questions are discussed which may be properly passed. A good deal of discussion is elicited by the ruling that the plaintiff's intestate had a right of passage across the railroad. Perhaps the point may be avoided upon the ground of a license or permission from the defendant company to the public, as was the case in *Barry v. Railroad*, 92 N. Y. 286.

Exceptions sustained.

**Due Care inferable from Ordinary Habits of Prudent Men.**—It is held in some cases that the exercise of due care upon the part of a person who has been run over and killed at a railroad crossing may be inferred from the ordinary habits of prudent men to avoid danger. *Northern Central R. Co. v. State*, 29 Md. 420; *Northern Central R. Co. v. Geis*, 31 Md. 357; *Gay v. Winter*, 34 Cal. 153; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65; *Cleveland & P. R. Co. v. Rowan et ux.*, 66 Pa. St. 393; *Lehigh Valley R. R. Co. v. Hall*, 61 Pa. St. 361; *Weiss v. Pennsylvania R. R. Co.*, 79 Pa. St. 387; *Phila., W. & B. R. Co. v. Stebbing*, *supra*, 86; *Maryland Central R. Co. v. Newbern*, *supra*, 261.

## WABASH, ST. LOUIS AND PACIFIC RY. Co.

v.

WALLACE.

(110 *Illinois Reports*, 114.)

Although a railway company may omit the statutory duty of ringing a bell or sounding a whistle at a public road crossing, still a party claiming to recover for an injury in consequence of such omission of duty, must have used due care and caution. The negligence of the company does not absolve him from all care. The plaintiff in such case, to recover, is required to exercise such care as might be expected of prudent men generally, under like circumstances.

Where it is well known to the servants of a railway company and a person injured at a road crossing, that such place is unusually hazardous, it is the duty of both parties to use more care than at ordinary crossings where the danger is not so great. In such case the servants of the company should ring the bell and sound the whistle to the full extent of the statutory requirement.

If a plaintiff who is injured at a highway crossing by a railway train does omit some slight precaution for his safety, and the railway company omits all care on its part, the plaintiff will not be without remedy. If the plaintiff's negligence is slight, and that of the company, when compared with that of plaintiff, is gross, a recovery may be had.

What is prudence and proper care under some circumstances may be negligence in others; and so, negligence in danger under some circumstances might be regarded as prudence under others. Each case must depend largely on its own facts.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will County.

Sleeper & Whiton for the appellant.

C. W. Brown and F. Bennett for the appellee.

WALKER, J.—This was an action on the case, instituted by appellee, Wallace, against appellant, to recover for injuries claimed to have been inflicted by the servants of appellant, in the negligent management of a train on its railroad. These were three counts in the declaration, in which it was averred that appellant's servants drove an engine and train on its road over the crossing of a highway so negligently that appellee was struck and injured, and his horse was damaged; that no whistle was sounded or bell rung, as required by statute, nor was there the sign required by the statute placed at the crossing; also, that the company had negligently permitted high piles of dirt and other substances to remain on its right of way, so as to obstruct the view of an approaching train on the railroad, whereby appellee and his horse were struck

and injured. On a trial in the circuit court the jury found a verdict in favor of appellant for \$1150. A motion for a new trial was entered and overruled, and judgment rendered on the verdict. An appeal was perfected to the Appellate Court for the Second District, where, on a hearing, the judgment was affirmed, and the company brings the case to this court by appeal.

The facts are settled by the findings of the circuit and appellate courts, and we are relieved from their consideration, further than as they are a basis for the rulings of the court in trying the cause. We shall examine some of the objections urged against such rulings.

Objections are urged against the appellee's seventh instruction. It is this:

"The jury are instructed that if they believe, from the evidence, that a bell was not rung or a steam whistle sounded, at a distance of eighty rods from the crossing of said defendant's railroad across said north and south highway, and kept ringing or whistling until the crossing was reached, and the plaintiff was lulled into security by reason of such neglect on the part of the defendant, then the plaintiff would have the right to recover for any injury caused thereby, even though he was guilty of slight negligence."

Appellee cites in support of this instruction the case of *Chicago & Alton R. R. Co. v. Elmore*, 67 Ill. 178, and it seems to support the rule contained in the instruction. But the rule has been disregarded in subsequent cases. The cases of *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 80 Ill. 88, and *Chicago, Burlington & Quincy R. R. Co. v. Johnson*, 103 Id. 512, s. c., 8 Am. & Eng. R. R. Cas. 225, clearly modify the rule announced by that case. They hold, that although the railroad company may omit the duty imposed by the statute, of ringing a bell or sounding a whistle, still the plaintiff must use care and caution,—that the negligence of the company does not absolve him from all care. Such a neglect of duty on the part of the company will no doubt exonerate the plaintiff from as high a degree of care as would have been required had it performed the duty. Plaintiff, under such circumstances, is required to exercise care, and such care as might be expected from prudent men generally, under like circumstances. So far, therefore, as the *Elmore* case conflicts with the views here expressed, it is overruled.

In this case both parties knew that the place where the accident occurred was more than usually hazardous, and knowing that fact, both parties were under the duty of using more caution than at ordinary crossings. The road on which appellee was travelling bore almost due north and south, and he was travelling from the north. The railroad was located at an angle of about thirty degrees east of the road, north of the crossing. Where the collision occurred both appellee and the train approached it, the one from the

north, and the other from thirty degrees east of north. The train approached appellee from behind, or nearly so, and to have seen the train he would have been compelled to almost turn facing that part of the road behind him,—hence the great necessity that the servants of the company should have rung the bell or sounded the whistle to the full extent of the statutory requirement. The omission of duty, and the want of care on the part of appellee, should not absolve the company from the use of care. Human life cannot be thus sacrificed under the sanction of law. If the injured party does omit some slight precaution for his safety, and the company omits all care on its part, still the injured party is not without a remedy. If the plaintiff's negligence is slight, and that of the company, when compared with that of the plaintiff, is gross, a recovery can nevertheless be had. If both parties were to use the highest possible degree of care, such accidents as this could never occur; but the law does not demand that degree of care, because it is impracticable in the ordinary affairs of life, hence reasonable care is required.

It is impossible, in the nature of things, to lay down more than general rules, as exactness and precision are impossible, because two cases are never more than approximately the same. Nor can there be any precise requirement demanded of individuals. Perhaps two persons of the highest order of intelligence and caution would not act precisely alike when menaced with the same imminent peril. Under the facts in each case we can only say that men have not acted as prudent men would be expected to do under the circumstances, and omitting to thus act, we can say they have not used due care when menaced with sudden and unexpected danger, or we can say they have done all that prudence requires. What is prudence and proper care under some circumstances is negligence under others, and so, negligence in danger under some circumstances would be regarded as prudence under others. Each case must necessarily depend largely on its own facts. But the instruction lacked the qualification that appellee was required to use care to avoid the accident, and was erroneous.

The judgment of the Appellate Court is reversed, and the cause remanded.

Judgment reversed.

**Company not giving Statutory Signals not Liable in case of Contributory Negligence.**—A railroad company whose servants have failed to sound the statutory signal on approaching a crossing are ordinarily not held liable for any injury occurring in consequence when the injured person has himself been guilty of contributory negligence. *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 576; *Houston & T. C. R. Co. v. Nixon*, 52 Tex. 19; *Cleveland, C. C. & I. R. Co. v. Elliott*, 28 Ohio St. 340; *Shaw v. Jewett*, 86 N. Y. 616; s. c., 6 Am. & Eng. R. R. Cas. 111; *Meeks v. Southern Pacific R. Co.*, 52 Cal. 602; *Harlan v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 480; *Steves v. Oswego, etc., R. Co.*, 18 N. Y. 422; *Toledo, etc., R. Co. v. Riley*, 47 Ill. 514; *Hinckley v. Cape Cod*

R. Co., 120 Mass. 257; Rothe v. Milwaukee, etc., R. Co., 21 Wisc. 256; Havens v. Erie, etc., R. Co., 41 N. Y. 296; Henze v. St. Louis, K. C. & N. R. Co., 2 Am. & Eng. R. R. Cas. 212; Penna. R. Co. v. Righter, 2 Am. & Eng. R. R. Cas. 220; Kansas Pac. R. Co. v. Richardson, 6 Am. & Eng. R. R. Cas. 96; Shaw v. Jewett, 6 Am. & Eng. R. R. Cas. 111; International & St. N. R. Co. v. Jordan, 10 Am. & Eng. R. R. Cas. 301.

But see Harty v. Central, etc., R. Co., 42 N. Y. 468; Levy v. Great Western R. Co., 48 N. Y. 675; Galena, etc., R. Co. v. Loomis, 13 Ill. 458; Chicago, etc., R. Co. v. Reid, 24 Ill. 144; Zeigler v. Railroad Co., 5 S. C. 221; Langan v. St. Louis, etc., R. Co., 6 Cent. L. J. 175; Meyer v. Lindell, etc., R. Co., 6 Cent. L. J. 475.

**Law of Comparative Negligence at Railroad Crossings.**—Under the rule as to comparative negligence in force in Illinois it is well settled that when a railroad company fails to give statutory signals and the contributory negligence of a party is slight compared with the negligence of the company, he is entitled to recover. Chicago, etc., R. Co. v. McKean, 40 Ill. 218; Chicago, etc., R. Co. v. Fears, 53 Ill. 115; Illinois, etc., R. Co. v. Moffit, 67 Ill. 431; Chicago, etc., R. Co. v. Lee, 68 Ill. 576; Illinois, etc., R. Co. v. Goddard, 72 Ill. 567; Illinois, etc., R. Co. v. Benton, 69 Ill. 174; Chicago, etc., R. Co. v. Hatch, 79 Ill. 137; Illinois Central R. Co. v. Hammer, 85 Ill. 526; Chicago, B. & Q. R. Co. v. Lee, 87 Ill. 454; Wabash R. R. Co. v. Henks, 91 Ill. 406; Stratton v. Central C. H. R. Co., 1 Am. & Eng. R. R. Cas. 115; Chicago & N. W. R. Co. v. Dimmick, 2 Am. & Eng. R. R. Cas. 201; Chicago, etc., R. Co. v. Johnson, 8 Am. & Eng. R. R. Cas. 225; Chicago & Alton R. R. Co. v. Bonifield, 8 Am. & Eng. R. R. Cas. 493; Peoria & P. U. R. Co. v. Clayberg, 15 Am. & Eng. R. R. Cas. 356.

In Georgia the law is to the same effect. Augusta, etc., R. Co. v. McMurry, 24 Ga. 75; Macon, etc., R. Co. v. Davis, 27 Ga. 113.

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### MANTEL v. CHICAGO, M. AND ST. P. R. CO.

#### MINNEAPOLIS ST. RY. CO. v. CHICAGO, M. AND ST. P. R. CO.

(*Advance Case, Minnesota. January 3, 1885.*)

A driver of a horse car perfectly familiar with a crossing of a steam railroad approached said crossing at a speed which was considerable. The view was so obstructed that he could not see up and down the track until within about forty feet of it. When within about twenty-five or thirty feet of the track he first became aware of an approaching train. He then put down the brake and endeavored to stop the car, but its momentum was such that it ran upon the track and was struck by the approaching train. Both the driver and car were injured.

*Held*, that the driver had been guilty of such contributory negligence as precluded recovery either by himself or by the horse-car company.

Expert evidence was not admissible as to whether or not above conduct constituted negligence on the part of the driver.

APPEAL from a judgment of the district court, Hennepin County.

Wilson & Lawrence for respondents, P. H. Mantel and Minne-

apolis Street Ry. Co., and Ell Torrence for respondent, P. H. Mantel.

W. H. Morris for appellant, Chicago, M. & St. P. Ry. Co.

GILFILLAN, C. J.—These are two actions, tried together in the court below, to recover for injuries caused by a collision at a street crossing of a street car belonging to the street railway company, driven by the plaintiff, Mantel, with a train of flat cars of defendant, by which Mantel and the street car and the horse drawing it were injured. The chief point here, as upon the trial below, relates to the alleged contributory negligence of the driver of the street car. The collision took place at the intersection of one of defendant's tracks with Cedar Avenue, a street running north and south in the city of Minneapolis, along which and crossing the track ran one of the lines of the street railway company. A train of 11 flat cars pushed by a locomotive was backing on defendant's track from the eastward, and had reached and was on the crossing of the two tracks when the street car coming from the north ran into it. Only one car ran on this street-car line, and it ran from some point north of defendant's line to a point on Cedar Avenue, a little over a block south, where it turned and went back, making 30 round trips, or crossing defendant's track 60 times a day. Mantel was, and for three or four weeks prior to the collision had been, the only driver of this car, so that for three or four weeks he had been in the habit of making the crossing 60 times a day. He must be presumed to have been, and his testimony shows that he was, perfectly familiar with the situation, with the dangers of the crossing, and the necessity of exercising care in approaching and crossing. Nothing but an almost inconceivable neglect on his part could have left him ignorant of those things. For two or three weeks there had been, besides other trains, regular and irregular, two flat or gravel car trains running on defendant's track, the latter crossing Cedar Avenue in all 14 times a day between 7 in the morning and 6 in the evening.

The track of defendant crosses the avenue, and then curves to the north, until, at the distance of about a quarter of a mile, it runs nearly parallel to it. It runs on an embankment from a point 550 feet northeasterly from the crossing, and on that part the track itself can be seen from various parts of the avenue. There are some sheds intervening in such a way that at a point on the avenue 465 feet north of the crossing the south line of Twenty-eighth Street, the nearest point at which the track can be thus seen, is 880 feet from the crossing, and to one going north on the avenue the track can be seen nearer the crossing as he goes further north, till at 1200 feet north the track can be seen at a point 558 feet from the crossing. From the latter point to the crossing defendant's track runs through a cut varying from 4 feet 7 inches to 5 feet 6



inches in depth to a point 184 feet from the crossing, where it is 2 feet 8 inches in depth, and from there it lessens in depth to the crossing south of Twenty-eighth Street. There are between the avenue and defendant's track, buildings and fences somewhat obstructing the view, until 40 feet from the crossing, so that it is evident one might pass south over that part of the avenue and not see a train of flat cars and locomotive on the track to the eastward, though he looked in that direction. Mantel testifies that he looked in that direction, but saw nothing. Within 40 feet north of the crossing nothing obstructs the view along the track to a point 184 feet east. At the latter point the cut was 2 feet 8 inches deep. The height of a flat car was shown to be from  $3\frac{1}{4}$  to 4 feet, so that at that point from 10 to 16 inches or more in height of the upper part of the flat cars would be visible to one looking eastward from any point on the avenue within 40 feet north from the crossing. The train in question was about 400 feet long. On the flat car nearest the crossing there was a man standing. From a point on the avenue 200 feet north to the crossing there is a fall of 2 feet 4 inches, of which 1 foot 6 inches is in the 100 feet nearest the crossing. When driving towards the crossing Mantel stopped to let off some passengers, at a point about 265 feet to the north of it, and says that he then looked and listened, and as he neither saw nor heard anything he thought everything was clear, and started on. He drove his horse on a trot, with the brake half set, making, as he says, probably about four miles an hour, till he was about 25 or 30 feet from the crossing, at which point he was looking towards the west, and, immediately turning to look east, he heard a shout, and saw the train approaching. He says he at once applied the brake, but was unable to stop his car in time to avoid the collision. He testifies that the brake was in good order.

There is no reason apparent, and no attempt was made to give any, for the inability to stop the car, except that its momentum, when it reached the point where the driver saw the approaching train, was such that it could not be stopped by the brake within the distance it had to go before reaching the crossing. He testifies that he could not tell within what distance a car could be stopped going down that grade, with the brake half set, at the rate of four miles an hour, but that when going at that rate on a level, with the brake in good order, it would probably take 15, 20, or 25 feet. This statement of facts is made solely from Mantel's testimony, and maps in evidence admitted to be correct.

A summary of the situation is this: While driving down the avenue from a point 265 feet to a point 40 feet from the crossing, Mantel, by reason of buildings and fences and the cut partially obstructing the view, and, perhaps, of some part of his attention being required in the opposite direction and in the care of his horse and car, could not be any way sure that he would see a train of flat

**cars if coming, as this train was, within such distance as would make it necessary for him to stop his car before reaching the crossing, and his hearing the train might be prevented by the direction of the wind or the noise made by his horse and car.**

It was, therefore, not prudent for him to rely solely on the fact that upon looking he did not see any train, and upon listening he did not hear any. At 40 feet distance he could, by looking, make himself entirely sure that there was or was not a train coming dangerously near the crossing. If he had not looked at all within that distance, but had driven right on, no sane man would say that he acted with due care. And yet what good would looking within that distance do if he had allowed his car to acquire such momentum that he could not stop it within that distance if he saw a train approaching too near? By permitting it to acquire that momentum, and keep it till he was within 25 or 30 feet of the crossing, where, if we are to credit him with a proper endeavor to stop, he could not stop in time, he rendered looking practically useless as a means to secure his safety. That it was a grossly imprudent way to approach so dangerous a thing as a railroad crossing, over which trains frequently pass, is too clear to admit of any reasonable question. No one fairly, reasonably, and understandingly exercising his judgment could come to any other conclusion. As this renders a new trial necessary, we need not consider the other points in the case, which may not arise on the second trial, except, perhaps, the rulings of the court below upon certain parts of the depositions offered. As to those, we will say that whether this or that act of plaintiff or defendant was negligence, and whether due care required this or that to be done, are not matters for expert testimony. They are not matters of science or skill, as might be such a question as how long it would take to stop a train of cars or a street car going at a designated rate of speed, but they are matters of judgment and common experience, to be determined, upon the facts and circumstances of the case, by the jury, who are as competent to determine them as any witness can be.

**Judgments reversed, and new trial ordered.**

**Driving towards Crossing at Speed too great to Check.**—When a person familiar with a railroad crossing drives towards it at so great a rate of speed that he is unable to check and stop his vehicle in time to escape collision with a passing train, he will be held guilty of gross contributory negligence. *Salter v. Utica, etc., R. Co.*, 18 Hun, 187; *Haring v. New York, etc., R. Co.*, 18 Barb. 9; *Grippen v. New York, etc., R. Co.*, 40 N. Y. 34; *Snows v. Maine, etc., R. Co.*, 67 Me. 100.

PENOE

v.

CHICAGO, R. I. AND P. R. Co.

*(Advance Case, Iowa. June 4, 1884.)*

Where a party driving has, at a distance of 50 feet from the railroad, an unobstructed view of 1300 feet of the track, and his attention is in no way diverted from seeing an approaching train, his failure to look and listen is such negligence that he cannot recover if injured by a train upon the track.

Where two tracks run parallel at some distance apart, though the train on the first track might have prevented the plaintiff from seeing the train on the second track (the one on which the collision occurred), he is not excused from seeing the train on the first track, the view being unobstructed, and waiting until it passed to see if there was danger in crossing the second track; the crossing of one track, and the attempt to cross the other, were parts of one act.

APPEAL from Polk Circuit Court.

This is an action for a personal injury caused by a collision of one of defendant's trains with a wagon in which plaintiff was riding, at or near a public crossing of defendant's railroad track. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for \$10,000. The defendant appeals.

Wright, Cummins & Wright for appellant.

Parsons & Runnells for appellee.

ROTHROCK, C. J.—On the evening of October 30, 1878, at about dark, the plaintiff and one Crews left Des Moines in a common road wagon drawn by a team of mules, to go to the plaintiff's home, in the eastern part of Polk County. The team and wagon belonged to the plaintiff, and were driven by Crews, who was plaintiff's tenant, and worked for him. For a few miles out of Des Moines, the tracks of the Chicago, Rock Island & Pacific R. R. and the Keokuk & Des Moines R. R. run parallel and, at places, near to each other, and both railroads were then operated by the defendant. The plaintiff and Crews were travelling upon a highway which runs parallel with the railroad tracks, and crosses them in two or more places. In going east on the highway they crossed the railroad tracks from the north to the south side near the city limits. From that crossing they proceeded in an easterly direction on the south side of the railroad tracks to a second crossing, where they approached the track of the Keokuk & Des Moines road in a northeasterly direction, and crossed over the same immediately in front of a freight train going east. The team became frightened and unmanageable, and ran along the highway to the other railroad track, a distance of about 216 feet, where it came in

collision with a freight train going east on that track. By the collision one of the mules was killed, the wagon broken, and the plaintiff severely injured.

The plaintiff claims that the defendant was negligent in several respects, including the construction of the two railroad tracks in close proximity, the great rate of speed at which the trains were running at the time of the accident, and the failure to whistle for the crossings, and the failure of the engineer of the train upon the northern track to avoid the injury after he discovered the plaintiff's danger. Upon the question as to negligence in running the trains there is a conflict in the evidence. The great preponderance is that the trains were not running at an unusual or inordinate speed, and that the usual signals for the crossings were given. And the evidence is undisputed that the engineer of the train on the northern track did not see the team and wagon in time to avoid the accident. And there is no proof that there was anything in the actions of the team to indicate to the persons on board the train that plaintiff and Crews had lost control of them. There is no evidence to dispute the statement of the engineer that it would have been impossible to check the speed of the train after he discovered the team, so as to have permitted it to cross the track in front of the train, and thus avoid the accident. The question, then, as to the failure of the engineer on the northern train to prevent the accident after discovering the danger, is practically out of the case.

It appears in evidence, without dispute, that the head-lights upon both of the engines were burning brightly, and that the plaintiff was perfectly familiar with the crossing. He stated in his testimony that he had travelled the road "hundreds, if not thousands, of times," and that he travelled it a great many times during the year preceding the accident, and that he knew the trains on the railroads were accustomed to pass in the evening. His account of the accident, as detailed by him in his testimony upon the trial, is as follows: "As I drove along that night I heard no train. It was very dark, and the wind was blowing from me, and we were anxious to know whether the trains had gone ahead of us. We wanted to be certain, and we stopped just after we had passed the line that runs south from where we travel directly east—that would be about seventy-five yards directly south of the track through Greaver's way; may be not more than fifty. We thought we could hear it there. We could not hear it and drove on. We stopped again before reaching the railroad track, and it was pretty dark, but we thought it was something near the cattle-guard east of Greaver's. Just before crossing was the last stop we made. The last stop would be fifty or sixty feet from the railroad crossing, the way the road runs. We neither saw nor heard the train. We then started on—supposed we were going over without trouble—and about the time we were near to the crossing there was a light

flashed and we felt a jerk. The light flashed again, and by this time we were just on the road, and we were going off of it, and it seemed by the brightness of the light, of course, very near to us. I drew myself up like to see—for I thought they would have hit the wagon—to see how much they had missed us. Up to that time I had seen a light. I had not heard a train. I knew the light was there, and was expecting it to hit the wagon. If I heard it just that moment I do not suppose I would have noticed it, for I expected that the train would hit the hind wheels of the wagon before we could get over the track; but we got over without being hit, and, as I threw my head back to see whether they had hit us or not, I saw the train on the other road. Mr. Crews was driving. I then saw we were between the tracks, and told him to give me a line and I would help him. He gave me one line, and I tried to hold one and he the other. The next we found the train kept them in motion, and we did not get them stopped. The light was so glaring we could not hardly tell what shape they were in, except that I found they were in motion. After the time I saw we were in motion, I concluded that I would look around and see where we were going. I saw the head-light of the cars on the north road, about fifteen to twenty—might have been thirty—feet, and saw that we were getting pretty close to it. I concluded I would make one more effort to see if I could not turn the team from it, and this left foot was braced against the end of the wagon gate. The pressure was not very good, but it was square against the end gate—the right foot. I was making all the efforts to hold the mules that I could make, and at that time we were struck. Up to the time that we had crossed the south track I did not hear a bell or whistle upon either train sound. My hearing is reasonably good; not as good as some men. I can hear a noise. I think I could have heard a whistle or a bell if it had sounded; no trouble about it. I do not think they sounded a bell or whistle. We tried very hard to hear it, and could not do it. My recollection is that I first heard the whistle upon the north train just about the time we found that we were not going to be hit. The whistle of the south train had so much effect on the mules that we could not manage them. I do not think the engine on the south road was more than thirty feet from us when it sounded the whistle. We did our utmost to keep the mules from going on the track.”

It should be stated here that the wagon road crosses the railroad tracks diagonally, and that while the distance from one track to the other is 216 feet, the distance direct from one track to the other is about 80 feet, and the train on the southern track was somewhat ahead of that on the northern track. The plaintiff testifies that his team was travelling three or four miles an hour and could have been stopped in five or six feet, and that if he had seen the head-light when twenty or thirty feet away from the southern track,

he could surely have stopped the team. It was a material question, then, for the jury to determine whether or not the plaintiff or Crews could have seen the head-light in time to have checked the team, and allowed the train on the southern track to pass without attempting to pass in front of it. The evidence shows that at a point in the highway 50 feet from the southern track, the head-light of an engine on that track would be visible for about 1300 feet to the west. At the instance of the defendant the following interrogatory, among others, was propounded to the jury: "How far westerly from the crossing of the Keokuk & Des Moines track (the northern track) would an engine or its head-light be visible to a person in a wagon fifty feet from said crossing westerly on the highway?" The answer to this question by the jury was in these words: "About thirteen hundred feet." The finding could not have been otherwise without a total disregard of the evidence. It also conclusively appears that as a traveller approached the crossing, an engine and its head-light would be in full view from that point to the crossing, at any point on the railroad track for 1300 feet to the west.

It is unnecessary for us to repeat what has so often been said by this court as to the negligence of a person who approaches a railroad crossing where there is an unobstructed view of the track, and where there is nothing tending to confuse the traveller or divert his attention, so as to excuse him from looking and listening for an approaching train. It is everywhere held that for his failure to look and listen he is chargeable with such negligence that he cannot recover if injured by a train upon the track. In this case it is true that the plaintiff escaped injury from a train on that track; but his escape, according to his own testimony, was an exceedingly narrow one. It is not claimed that there was anything that diverted his attention, or that there was any semblance of excuse for not seeing the approaching train 1300 feet away. It is true it is claimed by plaintiff's counsel that the travelled track has been changed since the accident, and that as the road was then travelled the head-light of an engine could not be seen 1300 feet to the west, and it is claimed that there were other obstructions to a view of the track which have since been removed. But these claims are not supported by the evidence, and the jury in answer to the above interrogatory make no such qualifications. If the plaintiff is to be understood as claiming in his testimony that an engine and its head-light could not be seen from his wagon in the road 1300 feet to the westward upon the Keokuk & Des Moines track, his evidence would be insufficient to raise a conflict upon the question, for his statement would be against actual demonstration by measurements and observations made with an engine upon the track.

If, then, the plaintiff was negligent in not seeing the approaching train upon the southern track, the question remaining to be deter-



mined is, notwithstanding the negligence of the plaintiff in making the crossing, is he entitled to recover because the engineer blew the whistle at about the time plaintiff made the crossing? The preponderance of the evidence upon that question is that the whistle was not sounded at the crossing. And the engineer and others upon the train, all testified that they did not see the plaintiff and his wagon until after he had crossed the southern track, and until just about the time of the collision. Now, whether it was negligence to sound the whistle we need not determine, because if sounded without any reference to the wagon being on or near the crossing, as it was not seen. Indeed, the great preponderance of the evidence is that if the whistle was sounded at all, it was at a point some place west of the crossing. However this may be, we think the crossing of the one track, and the attempt by plaintiff to cross the other, were all parts of one act.

The jury found, in answer to special interrogatories submitted to them at the instance of the plaintiff, that the plaintiff, before he crossed the southern track, could not see the train on the northern track, because the train on the southern track obstructed his view. And this must have been the theory upon which the jury excused the plaintiff for not seeing the train on the northern track. But this would not excuse him from not seeing the train on the southern track, and waiting until it passed to see if there was danger in crossing the northern track.

We have discussed the general features of this case without giving the testimony in detail, and our conclusion is that there was no evidence upon which to found a verdict for the plaintiff. The plaintiff's man Crews was not a witness upon the trial. The evidence shows that the plaintiff was sometimes addicted to intoxication, and he admits that he took medicine upon that day in which were small quantities of whiskey. There was a jug of whiskey in the wagon, but plaintiff claims that neither he nor Crews drank therefrom. If it were not for his positive denial that he was intoxicated, his rashness in driving upon the southern track and barely escaping contact with the engine could be readily accounted for.

There are many other questions discussed by counsel which we need not determine. We may say, however, in view of a new trial, that the proof of a rule requiring brakemen to ride upon the top of the train was improperly allowed, because it does not appear that the accident was in any way attributable to a violation of this rule. In our opinion, when it is conceded, as it must be, that the plaintiff had an unobstructed view of the southern track for 1300 feet from the last 50 feet before he reached the track, and his attention was in no way diverted from seeing it, that he cannot recover.

Reversed.

**Analogous Case.**—In the case of Philadelphia & Reading R. R. Co. v. Carr,

99 Pa. St. 505, s. c., 6 Am. & Eng. R. R. Cas. 185, where the facts were almost precisely identical with those of the above case, it was held that the question of contributory negligence was under the circumstances for the jury and that the plaintiff's conduct was not contributory negligence *per se*.

**Duty of Person Approaching Crossing with View Obstructed.**—In general where the view is obstructed at a crossing, the duty of a person approaching is a question for the jury. *Besiegel v. N. Y. Central R. Co.*, 34 N. Y. 622; *Artz v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 158; *Bunting v. Central Pacific R. Co.*, 14 Nev. 351; *Haas v. Grand Rapids & S. R. Co.*, 8 Am. & Eng. R. R. Cas. 268; *Kansas Pac. R. Co. v. Richardson*, 6 Am. & Eng. R. R. Cas. 96; *Tucker v. Duncan*, 6 Am. & Eng. R. R. Cas. 268; *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 437; *Johnson's Adm'r v. L. & N. R. Co.*, 13 Am. & Eng. R. R. Cas. 623; *Funston v. Chicago, R. I. & P. R. Co.*, 14 Am. & Eng. R. R. Cas. 640.

**Duty of Driver of Team Approaching Crossing with View Obstructed.**—As to whether the driver of a team upon approaching a crossing with the view obstructed is bound to alight and look in advance, see the following cases: *Duffy v. Chicago & N. W. R. Co.*, 32 Wisc. 274; *Richardson v. New York Central R. Co.*, 45 N. Y. 846; *Pennsylvania R. R. Co. v. Beale*, 72 Pa. St. 504; *Mackay v. New York Central R. Co.*, 35 N. Y. 74; *Dolan v. Delaware & Hudson Canal Co.*, 71 N. Y. 285; *Haas v. Grand Rapids & S. R. Co.*, 8 Am. & Eng. R. R. Cas. 268; *Pittsburgh, etc., R. Co. v. Martin*, 8 Am. & Eng. R. R. Cas. 253; *Strong v. Placerville R. R. Co.*, 8 Am. & Eng. R. R. Cas. 273.

**Obstructions not Hindering View.**—Where the obstruction is not of such a character as to hinder the view of the road, were a person approaching to use reasonable care, he is bound to exercise such care. *Central R. R. Co. v. Feller*, 84 Pa. St. 226; *Salter v. Utica & Black River R. Co.*, 75 N. Y. 273.

**Duty of Railroad as to Obstructions.**—The construction by a railroad company of buildings or other erections at crossings of such a character as to obstruct the view is not negligence *per se*. *Central R. R. Co. v. Feller*, 84 Pa. St. 226. But see *Lehnertz v. Minneapolis, etc., R. Co.*, 15 Am. & Eng. R. R. Cas. 370. But it has been held in some cases negligence *per se* to suffer weeds or rubbish to grow or accumulate along the line of a railroad so as to obstruct the view at crossings. *Rockford, R. I. & St. L. R. Co. v. Hillmer*, 72 Ill. 235; *Indianapolis & St. L. R. Co. v. Smith*, 78 Ill. 112; *Dimock v. Chicago & N. W. R. Co.*, 80 Ill. 338; *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454.

**Duty of Train Hands on Approaching Crossing with View Obstructed.**—Where there are obstructions, the duty of the railroad company is to give proper and necessary warning such as the enhanced danger requires. *Nehrbas v. Central Pac. R. Co.*, 14 Am. & Eng. R. R. Cas. 670; *Mackay v. New York Central R. Co.*, 35 N. Y. 75; *Richardson v. New York Central R. Co.*, 45 N. Y. 846; *Cordell v. New York Central & H. R. R. Co.*, 75 N. Y., 330; *Thomas v. Delaware, etc., R. R. Co.*, 8 Fed. Rep. 728; *Funston v. Chicago, R. I. & P. R. Co.*, 14 Am. & Eng. R. R. Cas. 640. But there is no legal duty to establish a flagman. *Haas v. Grand Rapids & S. R. Co.*, 8 Am. & Eng. R. R. Cas. 268.

**Obstructions Caused by Party Injured.**—Where the obstruction in question is created by and is entirely the fault of the person injured, the principles above laid down have, of course, no application. In such case the party is held to the same measure of duty as though no obstruction existed. *Roth v. Milwaukee & St. Paul R. Co.*, 21 Wisc. 256; *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 325; *Hanover R. R. Co. v. Coyle*, 55 Pa. St. 396; *Pennsylvania R. R. Co. v. Werner*, 89 Pa. St. 59.

SHARP

v.

GLUSHING.

(96 *New York Reports*, 676.)

A person driving in a covered wagon through the streets of a city saw a train pass at a street crossing and observed the gate raised. He drove to within thirty feet of the track, where the view was somewhat obstructed, and not seeing or hearing any train drove on the track, where his horse was killed and his wagon wrecked by a passing train, ringing no bell and sounding no whistle. In a suit against the company to recover damages the contributory negligence alleged was the failure on the part of plaintiff to look up and down the track when closer to it than thirty feet. *Held*, that the question of contributory negligence was properly left to the jury.

THIS action was brought to recover damages alleged to have been caused by defendant's negligence.

Edward E. Sprague for appellant.

Oliver S. Ackeley for respondent.

EARL, J.—The defendant is receiver of the Long Island R. R. Co., and, as such, operates that road. There are two tracks of the road laid in Atlantic Avenue in the city of Brooklyn. On the morning of November 8, 1880, the plaintiff was approaching that avenue from the south in New York Avenue, in a covered milk wagon drawn by one horse, and saw a train of cars pass east, and then he saw the gateman raise the gates at the crossing and go into the gate house. He drove on, and at the cross-walk of Atlantic Avenue carefully looked both ways and seeing no train drove on to the railroad where his horse was killed and his wagon wrecked by collision with a train going west. This action was brought to recover the damage thus caused.

The evidence showed that no bell was rung or whistle blown and that the gate was raised, and thus the carelessness of the defendant was established. But the claim of the defendant is that the plaintiff should have been nonsuited on account of his own carelessness, and this claim he bases upon these facts: that at the place where the plaintiff looked, about thirty feet from the railroad track, his view was somewhat obstructed and that he did not look again while passing the thirty feet, although during that space his view was unobstructed and he could have seen the train if he had looked. We think the case as to plaintiff's negligence was properly submitted to the jury. He looked both ways, and whether, under all the circumstances, he should have looked again or continued to look, was for the jury to determine. The raising of the gate was

a substantial assurance to him of safety, just as significant as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it, is against all human experience. The conduct of the gateman cannot be ignored in passing upon plaintiff's conduct, and it was properly to be considered by the jury with all the other circumstances of the case.

The court submitted the case to the jury with proper instructions as to the law, and their verdict cannot be disturbed.

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COPLEY, Administratrix,

v.

NEW HAVEN AND NORTHAMPTON Co.

(136 *Massachusetts Reports*, 6.)

In an action against a railroad corporation, on the St. of 1881, c. 199, § 2, for running over and killing a girl sixteen years old, at a place where a highway crossed a railroad at grade, there was contradictory evidence upon the question of the neglect of the defendant to give the signals required by law, but it was conceded that the head-light of the locomotive engine was burning, that the girl was familiar with the locality, that the track was visible for nearly a mile, and that, at the time, it was not dark, but twilight. The plaintiff's evidence tended to show that, when the locomotive engine was within from three to six rods of the crossing, the whistle was blown twice, and the girl, who was then within a few feet of the track, quickened her pace and ran upon the track, and was killed. *Held*, that the burden of proof was upon the defendant to show that the girl was guilty of gross or wilful negligence. *Held*, also, that the court could not say, as matter of law, that attempting to cross the track, under such circumstances, was gross or wilful negligence.

TORT, under the St. of 1881, c. 199, § 2, for causing the death of the plaintiff's intestate, on June 30, 1881, at a place in Westfield, where the defendant's railroad crossed a highway at grade. Trial in the Superior Court, before Pitman, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff's intestate, a girl sixteen years of age, was killed by a locomotive engine at the time and place alleged. There was contradictory evidence upon the question of the neglect of the defendant corporation to give the signals required by law; but there was no dispute that, when the train of the defendant, hereinafter referred to, was within from three to six rods of the crossing, the alarm-whistle of the engine was blown twice, and that the girl was then travelling in the highway within a few feet of the tracks of the corporation. She knew the locality, and had for a long time been in the habit of passing over the railroad of the defendant at this crossing. The accident occurred about half-past eight o'clock,

in the evening of June 30, 1881; it was not dark, but twilight, and a person could easily be recognized for a considerable distance. The railroad track was plainly visible for nearly a mile, nearly all the way from the house of Miss Pratt, hereafter mentioned, to the railroad track. This house was about twelve rods from the crossing. The jury took a view of the premises.

H. F. Avery, in behalf of the plaintiff, testified that he saw the girl approaching the crossing; that she was walking at her usual gait until within three or four feet of the railroad tracks, when the locomotive engine gave the "danger-whistle," and the girl quickened her pace and ran, and went upon the tracks; that when the train whistled it was within two or three rods of the crossing; that he did not hear any other whistle; and that the head-light was burning on the locomotive engine.

Simon Dolan, a witness for the defendant, testified that he saw the girl leave Miss Pratt's house; that, when she was about half-way from the house to the track, the train gave a long whistle at the whistling-post; that the girl then looked towards the train coming, and quickened her pace; that, when the train got within seven or eight rods of her, it gave two short whistles; and that she looked at the train again just before going upon the tracks.

Miss Pratt, a witness for the defendant, testified that after the girl left her house she heard a prolonged whistle; that the girl was then three to five rods from the house; that the girl turned her head and looked towards the train, and at once quickened her pace very much; that the witness went to another part of the house and heard two or three danger-whistles; that she heard the train coming, and judged by the noise it was coming faster than usual.

Michael Burke, a witness for the defendant, testified as follows: I was engineer. I saw the girl about ten to fifteen feet from the track; she was running. I was then fifty to seventy-five feet from the crossing. I gave danger-whistles, put on air-brake, and reversed the engine.

Upon this evidence, which was all the evidence in the case bearing upon the conduct and acts of the deceased, and all that was given as to the way the accident happened, although there was other evidence, not reported, upon which the jury might find that the signals required by law were not given, the defendant asked the judge to rule as follows:

"1. Upon all the evidence in the case, the plaintiff cannot recover. 2. If the jury believe that the deceased knew the train was coming at great speed, or might have known it by the exercise of proper diligence, and attempted to cross the track in front of the engine when the engine was within from three to six rods of her, it was gross negligence. 3. If a long and continuous whistle was given at the whistling-post, eighty rods from the cross-

ing, and the deceased heard it, and knew the train was coming across the road, and she attempted to pass in the road across the tracks, before the train, it was gross negligence. 4. If the deceased heard the whistles of 'down brakes,' otherwise called 'danger-whistles,' and then was within a few feet of the track, and the engine was within from three to six rods of her, coming at full speed, in plain view, and she attempted to pass across the tracks, it was gross negligence. 5. If she was grossly negligent, and such negligence contributed to the injury, she cannot recover. 6. If the deceased was not in the exercise of ordinary care, she was grossly negligent. 7. If the deceased knew the train was coming at great speed, and was about to cross the road, and saw or might have seen by the ordinary use of her senses that it was within six rods of the crossing, and she attempted to cross, she was guilty of gross negligence, whether any signals were given by the defendant or not. 8. If the collision caused the instant death of the deceased, the plaintiff cannot recover unless the deceased was in the exercise of due diligence."

The judge refused so to rule, except as to the fifth request, which he gave, and instructed the jury as follows:

"If the jury believe that the deceased knew that the train was coming at great speed, and knew that the engine was within from three to six rods of her, and was able at the time to appreciate and realize substantially the distances and the situation, or would have had such knowledge and appreciation if she had not been grossly inattentive or negligent, then it would be gross negligence for her to attempt to cross the track in front of the engine. And, upon such facts, it would be such negligence, whether any signals were given by the defendant or not. Also, if the deceased heard the whistles of 'down brakes,' otherwise called 'danger-whistles,' and then was within a few feet of the track, and the engine was within from three to six rods of her, coming at full speed in plain view, and the deceased was, at the time, able to understand and realize, substantially, the distances and situation, or would have had such knowledge and appreciation but for her gross negligence and inattention, then, under such circumstances, for her to attempt to cross the track in front of the engine would be gross negligence."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. M. Stearns and H. B. Stevens for the defendant.

H. W. Ely for the plaintiff.

C. ALLEN, J.—A majority of the court is of opinion that this case was properly submitted to the jury and under proper instructions. There was contradictory evidence upon the question whether the bell was rung or the whistle sounded at a distance of eighty rods from the crossing, as required by the St. of 1874, c. 372, §



123. It may have been found as a fact that no signal was given until the engine was within from three to six rods of the crossing, or even less. There was evidence tending to show that the deceased was then within three or four feet of the track, and that two sharp danger-whistles were then given, and that she started to run across the track. She had a right to rely, to some extent, upon the signals of warning which the law required to be given. *Gaynor v. Old Colony & Newport Ry.*, 100 Mass. 208; *Chaffee v. Lowell R. R.* 104 Mass. 108.

The want of such signals may have led to her being in that situation. This is a matter of inference. Finding herself there, in the evening, close upon the track, with no previous warning, with a train approaching at a great speed, and already within from three to six rods of her, and perhaps even less, startled by the sudden and sharp whistles, seeing a flashing head-light, with no time to reflect, we cannot say, as matter of law, that the burden which is imposed by statute on the defendant of showing, in addition to the mere want of ordinary care, such gross or wilful negligence as is contemplated by the St. of 1881, c. 199, § 2, was maintained by proving that she attempted to cross the track under these circumstances. Under this statute, it was not sufficient for the defendant to show merely a want of ordinary care on her part. A clear distinction is implied by the terms of the statute, under which gross or wilful negligence means something more. There was no error in allowing the jury to consider whether she was able at the time to appreciate and realize substantially the distances and the situation. The circumstances were such that we cannot say that the jury were not authorized to find, either that she was likely to be confused and bewildered, or to be misled as to the distance of the engine from her.

Exceptions overruled.

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UNION PACIFIC RY. Co.

v.

ADAMS.

(*Advance Case, Kansas. April 10, 1885.*)

Where an action is brought to recover for personal injury, and the plaintiff's testimony shows that his own negligence contributed directly to the injury, he has failed to make out a *prima facie* right of recovery, and the demurrer interposed to his evidence should be sustained.

It is the duty of a person about to cross a railroad track to make a vigilant use of his senses, as far as there is an opportunity, in order to ascertain if there is a present danger in crossing. A failure to listen or look, when

by taking this precaution the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury.

**ERROR** from Douglas County.

J. P. Usher and Charles Monroe for plaintiff in error.

Geo. J. Barker and J. W. Green for defendant in error.

**JOHNSTON, J.**—Samantha A. Adams sued the Union Pacific R. R. Co. in the district court of Douglas County to recover for injuries received by her, by being thrown from a spring wagon that was struck by a locomotive of a passenger train operated by defendant on its railroad. It appears that on the 9th day of October, 1880, the plaintiff, in company with Martin Adams, his wife, and two daughters, started from the city of Lawrence to go to the home of Martin Adams, in Jefferson County. The team and spring wagon in which they were riding was driven and owned by Mr. Adams, who, with his wife, sat in the front seat of the wagon, and the plaintiff and the two daughters of Mr. Adams occupied the hind seat. They travelled in a northerly direction near to and east of the defendant's railroad for a distance of two miles, where they intersected an east and west road running at right angles with the railroad, which at this point runs nearly north and south. The railroad crossing is about 500 feet west of this point. Upon the north side of the east and west road, where the turn was made, to within 18 feet of the railroad crossing, there is a high untrimmed hedge fence, which at that time was in full leaf, and to some extent was interlaced with weeds and grass. The plaintiff and her party turned and passed west over this road, driving along at a jog trot, and just as the horses reached the railroad track it was discovered that the passenger train of the defendant was coming down upon them from the north at a rapid rate, when Mr. Adams, the driver, whipped up the horses, and endeavored to cross in advance of the train, but the hind end of the wagon was struck by the locomotive, tipping it over, throwing the plaintiff upon the ground, dislocating her shoulder, and fracturing her arm. The plaintiff alleged in her petition that she was injured on account of the negligence of the employees of the defendant on the train in failing to sound the whistle 80 rods north of the crossing, as required by the statute, and she also stated that the railroad company had failed to place a notice at this point indicating the location of the railroad crossing. On the part of the defendant it was alleged that the plaintiff's injuries resulted solely from her own negligence, and that of Martin Adams, with whom she was riding at the time of the collision. Upon the trial, and after the plaintiff had offered her testimony and rested, a demurrer to her evidence was interposed and filed by the defendant, on the ground that no cause of action had been proven by her.

The testimony offered by the plaintiff tended to show, and upon this demurrer it must be held to have established, that the whistle of the engine was not sounded 80 rods away from the crossing as required; nor that any signal was given by those in charge of the train until the wagon was discovered by them upon the track, which was almost simultaneous with the collision. The negligence of the defendant, then, must be regarded as proved. The contention of the defendant, however, is that the plaintiff's testimony discloses that her own want of ordinary caution and care directly contributed to the injury. The negligence of the defendant in such a case is not always sufficient to warrant a recovery, and while contributory negligence on the part of the plaintiff is a matter of defence, still, if the plaintiff's evidence shows that her injury was the proximate result of her own negligence, she has failed to make out a *prima facie* case, and, notwithstanding the negligence of the defendant, the demurrer to the evidence should be sustained. *Gibson v. City of Wyandotte*, 20 Kan. 158.

It is now well settled, in this State and elsewhere, in cases where the plaintiff seeks to recover for injuries on the ground of defendant's negligence, that if the ordinary negligence of the plaintiff directly or proximately contributed to his injury, he cannot recover unless the injury was intentionally and wantonly caused by the defendant. *Gibson v. City of Wyandotte*, *supra*; *Jackson v. Kansas City, L. & S. K. Ry. Co.*, 31 Kan. 762; *Mason v. Missouri Pac. Ry. Co.*, 27 Kan. 83; *Corlett v. City of Leavenworth*, Id. 673; *Missouri Pac. Ry. Co. v. Haley*, 25 Kan. 35; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347; *Williams v. Atchison, T. & S. F. R. Co.*, 22 Kan. 118; *Artman v. Kansas Cent. Ry. Co.*, Id. 296; *Kansas P. Ry. Co. v. Pointer*, 14 Kan. 37; *Leavenworth, L. & G. R. Co. v. Rice*, 10 Kan. 426.

It is equally well settled that it is the duty of a traveller upon a highway, about to cross a railroad track, to make a vigilant use of his senses in order to ascertain if there is a present danger in crossing. This is required, not alone for his own safety, but also for the protection of the lives of the passengers upon the railway trains. The traveller who fails to take this precaution is not using ordinary care. How is it in this case? An examination of the plaintiff's evidence, we think, shows that the plaintiff and her driver were negligent. It appears that the parties drove up in a two-horse wagon upon a trot, in plain view of the railroad track, without stopping to listen or looking for the approach of a train, or taking any precaution whatsoever to learn whether there was danger in then attempting to cross. Both the plaintiff and Mr. Adams, who was driving the team, were familiar with the highway, well acquainted with the crossing, and with the fact that trains were frequently run over the road.

Martin Adams testified as follows:

"Q. Every one of you knew where the railroad was? A. Yes, sir. Q. It was right in plain sight of you when you were coming through that sandy road and cut? A. I saw where it was ahead of me. Q. You could see the railroad? A. Of course; it was elevated. Q. Were you thinking of the train at all? A. I don't recollect that I was. Q. You never thought of the possibility of a train until your horses' heads were on the track? A. Don't think I did. Q. Weren't you thinking about going on the track? A. I don't recollect of thinking anything particular about the train coming. Q. None of you were thinking about the train? A. Not that I know of. Q. I will ask you now the question, did you look or listen for the train at all? A. Not that I know of."

The plaintiff, Samantha Adams, testified:

"Q. You knew the railroad was there? A. Yes, sir; we knew the railroad was there. Q. You were not thinking about the train at all? A. No, sir; I was not. Q. You did not hear the cars coming? A. No, sir. Q. You did not hear anything of the train? A. No, sir; not anything. Q. Never thought of it? A. No; not particularly. Q. Did you look for the train in any way? A. Well, we could not have seen it if we looked right there. But we did not look though. I did not look. Q. Did you listen for it? A. No, sir."

Counsel say that it would have been unavailing to have looked for the train, as the bank and hedge upon the north side of the road crossing the track obstructed the view so that a train approaching from the north could not have been seen by the plaintiff. From the plaintiff's testimony, we observe, as has been stated before, that the distance from the corner where the party turned west to the railroad crossing was above five hundred feet. About half-way from the corner to this crossing is a cut in the road which extends to within about fifty feet of the railroad, the bank of which, together with the hedge, which was then covered with foliage, made it very difficult for parties passing along to have seen the coming train. It appears, however, from the testimony of several of plaintiff's witnesses, that there were places in the hedge through which the train might have been seen, and outside of this cut in the road it might have been easily seen by standing up in the wagon, and the view of the track was unobstructed from the point where the hedge terminated, which was eighteen feet east of the track. But if the obstructions had been such as to prevent plaintiff from seeing the track or train, then, in the exercise of ordinary care, she should have listened for the train, and it appears that the train could have been heard for some distance by giving attention and listening for a train before going upon the track. It is true that the wind was blowing in nearly an opposite direction from which the train was coming, but several of plaintiff's witnesses heard the train, and we have no doubt that if the plaintiff or Adams had

given heed and listened, they would have discovered its approach, and could thus have avoided the accident. In this case neither the plaintiff nor the driver either looked or listened, although their attention was called to the necessity of caution by seeing in advance of them the track of the railroad.

It has been said that "the track itself is a warning of danger." And I think it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight; and if either cannot be rendered available, the obligation to use the other is the stronger, to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is, of itself, negligence, and should be so pronounced by the courts as a matter of law." *Railroad Co. v. Miller*, 25 Mich. 290.

The supreme court of the United States, in speaking of the precautions and care that should be taken by persons about to cross a railroad, and the result of their failure to use such care, said:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." *Railroad Co. v. Houston*, 95 U. S. 697.

See, also, *Henze v. Railway Co.*, 71 Mo. 636; *Payne v. Railway Co.*, 39 Iowa, 523; *Railroad Co. v. Beale*, 73 Pa. St. 504; *Schaefer v. Chicago, M. & St. P. R. Co.*, 62 Iowa, 624; s. c., 17 N. W. Rep. 893; *McCall v. Railroad Co.*, 54 N. Y. 642; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 Mo. 476; s. c., 2 Am. & Eng. R. R. Cas. 191; *Pennsylvania R. Co. v. Richter*, 42 N. J. Law 180; s. c., 2 Am. & Eng. R. R. Cas. 220; note and cases cited on page 226, 2 Am. & Eng. R. R. Cas.; 1 *Thomp. Neg.* 424, 426, and cases cited.

Many other authorities like unto these could be cited respecting the care which should be exercised by persons about to cross a railroad track, but a sufficient number have been referred to, to show what the current and weight of authority is; and, within

the rules there laid down, we are constrained to hold that the evidence of the plaintiff showed a plain case of contributory negligence, both upon the part of the plaintiff and that of the driver, Martin Adams. We think the demurrer interposed by the defendant to plaintiff's evidence should have been sustained.

The judgment of the district will therefore be reversed, and the cause remanded, with instructions to sustain the demurrer to plaintiff's evidence.

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PITTSBURGH, CINCINNATI AND ST. LOUIS RY. CO.

v.

STALEY.

(*Advance Case, Ohio. June 8, 1884.*)

A railway company, by its train, unlawfully obstructed a village street. S. therefore walked around the rear of the train, entered another street, and there having selected one of several routes to her home, slipped on some ice, fell, and sustained serious injury. The same railway company had placed the ice there in the process of clearing its track, which occupied part of the street. The street was laid out after the railway was in use, and the rights of the public in said street were subject to the rights of the railway company.

*Held:* 1. The proximate cause of the injury was the placing of the ice in the street.

2. If the railway company was not in fault in so placing the ice, it was not liable for the injury caused by the fall.

**ERROR** to the District Court of Warren County.

On the seventeenth of January, A.D. 1877, a freight train of the Pittsburgh, Cincinnati & St. Louis Ry. Co., bound east, went upon a side track at Morrow, Warren County, Ohio, at eight o'clock P.M., and remained there until five minutes after nine o'clock. Although the train crossed Center Street in the village, no cars were uncoupled, and that street was completely blocked. The only reason for this was the expectation of the conductor that he would be ordered to move his train eastward at any moment. Mrs. Emily E. Staley, and others, resident in the village at points north of the railway, were in a church on Center Street, one square south of the railway when the train arrived. When the service ended they found the train blocking the street, and after waiting ten or fifteen minutes, they went to the west end (the rear) of the train, passed around the rear car, walked eastward between the tracks the length of three or four cars,



turned northward to cross another track of the railway, and as she was "just stepping off the last track" she slipped upon some ice piled there, fell and sustained serious injury to her "whole limb from" the "hip down." She suffered much pain, was confined to her bed for a time, to her room for a longer time, and claimed that her health was permanently impaired. A number of other women pursued the same route—some before, some behind, and some with Mrs. Staley. None of them fell. The evidence showed that it was unnecessary for her to step upon the pile of ice on which she slipped and fell. The village of Morrow was laid out after the railway was in use, and one street, called "Railroad Street," included the railway tracks and ran in the same direction with them. Snow fell and ice formed on the tracks in this street. The company, to clear its tracks for the passage of trains, removed this ice and snow, and cast it into the street on either side of the tracks. Mrs. Staley sued the company. The answer made the general issue. Evidence as to the manner in which the ice had been placed there was before the jury after trial. The charge to the jury contained the following instruction:

"But suppose the jury should find that there was negligence in the blocking of the street by the company, but none in the placing of the piles of dirt, ice or snow on or over which it is claimed the plaintiff fell without fault on her part in going that way, or in the mode of going—what, then, is the law?"

"Here comes the difficulty in the application of the rule as to proximate or remote consequences.

"Undoubtedly injuries might have been received by her as she passed around the train, for which the company would not be liable. For instance, suppose as she passed along, attempting to cross the road, she had been struck by a stone thrown by some ruffian. Clearly she would not thus have been injured if she had not gone by that route, but it is equally clear that this injury would not be one for which the company was liable.

"But suppose the injury results while so prudently and carefully passing around by some other instrumentality placed or maintained there by the defendant. I confess that I have great difficulty in arriving at a conclusion on this point.

"The law seems to me to be this: 'That if the original act (in this case the blocking of the street) was wrongful, and would naturally, according to the ordinary course of events prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which are innocent.' And an illustration of this doctrine given in the law books is the wrongful throwing of a lighted squib, which, being innocently warded off by several persons, at last struck and put out the eye of another person. The

original thrower was held liable. Now it seems to me that the question whether the injury in this case to Mrs. Staley was the proximate result of the original blocking of the street is one not to be settled by the court, but by the jury under appropriate instructions from the court. And I say to you that if the evidence shows that prior to the time in question the agents and servants of the company were in the habit frequently of blocking this same street by its cars unlawfully and negligently, and for more than five minutes, and persons thus prevented from crossing the street were accustomed to pass around the end of the train west of Center Street, down Railroad Street, and there cross the tracks and highway substantially as was done by the plaintiff, and these facts were known to the officers and agents of the company, that in such case the jury should determine under such circumstances whether the result which followed to Mrs. Staley might reasonably have been anticipated by the company, the defendant, and if you find that it might, and there was no fault on the part of the plaintiff, the company in that would be liable. But that if there was no such reason to apprehend the result, I say to you that it would not be the proximate result of the original act."

The verdict was for the sum of \$1625 in favor of the plaintiff. A motion for a new trial was overruled, and a bill of exceptions, containing all the evidence, duly made part of the record.

Nineteen errors were counted on in the petition in error. The seventeenth complained of this charge. The district court affirmed the judgment of the common pleas, and we are asked to reverse the judgments of both courts. Other parts of the charge and several refusals to charge as requested by the defendant, were also duly excepted to and assigned for error.

Charles Darlington for plaintiff in error.

J. D. Wallace and J. E. Smith for defendant in error.

GRANGER, C. J.—We are satisfied that the railway company violated section thirty-one (31) of the act relating to roads and highways, passed March 9, 1868 (S. & S. 669), and thereby became "liable for all damages arising to any person from such obstruction."

Counsel upon both sides have aided the court by able and carefully prepared arguments, citing and commenting upon the numerous cases in which the question, "What was the proximate cause of the injury?" has been discussed by American and English courts.

Judge Cooley, at page 69 of his work on Torts, thus briefly states the test:

"If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of

events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action."

Apply this to the noted "Squib" case, *Scott v. Shepherd*, 2 W. Black. 892. As soon as the fire reaches the explosive material in the squib an explosion naturally and usually follows. If, when thrown, it falls so near a person that to pick it up and cast it hurriedly elsewhere is the obvious means of escape from harm, such action naturally, and we may add usually follows. If this thus occurs in a crowded market space the natural and usual result would be injury to some one other than the person at whom it was first thrown. So long as the act of the second thrower is the result of mere impulse to avert danger to himself by removing the dangerous thing to a distance, the first thrower's act is in progress. But if the second thrower deliberates, even for a mere instant, and with intent to injure a third person, casts the squib at him, such deliberation and intent puts an end to the act of the first thrower, and the thing done by the second throw is not his fault.

So also if a wholesale druggist prepares a jar of belladonna, labels it "extract of dandelion," and sells it as such to a retail dealer, who uses it as "extract of dandelion" in filling a prescription; the great suffering of the patient who takes the medicine so prepared is plainly the natural and usual result of the act of the wholesale dealer. In the case referred to the defendant prepared the jar to be sold to a retailer, whose regular business it was to incorporate it in prescriptions to be swallowed by patients. The "concatenation" of Judge Cooley is particularly complete in this case of *Thomas v. Winchester*, 6 N. Y. 397.

In *Clark v. Chambers*, 7 C. L. J. 11, the defendant wrongfully placed a dangerous spiked hurdle in a private way, along which the plaintiff had a right to pass. Some person, without the defendant's knowledge, moved it a short distance, but left it still in the same private way. The plaintiff passing on a dark night, with knowledge of the original position of the hurdle, thinking to avoid it came into collision with it and was injured.

Having unlawfully placed the dangerous movable thing in a passage-way, so long as it remained in that way, it was there by the defendant's act. That such a movable thing in such a place would be moved by some passer-by, is, it seems to us, natural and not unusual; and he who originally placed it there should be held to contemplate such a possibility, and be responsible for results so long as he suffers it to remain in that way.

And we see Judge Cooley's "concatenation" in *Griggs v. Fehenstein*, 14 Minn. 81, and *Weick v. Lander*, 75 Ill. 93. The injury complained of in each of these cases, by a plain, clear and simple chain of cause and effect was "conjoined" to the wrongful act of the defendant, and was the result of its continuing force. In the

Minnesota case the action of the defendant's team frightened other horses and, we may well say, forced them against the horse and sleigh of the plaintiff. In the Illinois case the stoppage of the foremost wagon, by defendant's fault, forced the stoppage of the second wagon in such a position that the tongue of the third wagon *ex necessitate* passed into the second wagon and did the injury complained of. The like continuing force of the wrongful act is apparent in *Brown v. The Railway*, 54 Wis. 342, and *Drake v. Kiely*, 93 Penn. St. 492.

In the Wisconsin case the wrongful act caused a pregnant woman to leave the train three miles short of her destination on a cloudy night. This act forced her to walk to the station. This effort caused the injury.

In the Pennsylvania case the "lad of tender age" was wrongfully and forcibly put upon a train, carried five miles and there put off. This act forced him to go over the five miles. The doing this caused the injury. In each case the precise thing that did the harm was forced upon the injured person by the wrongful act of the defendant.

But the fact that she walked around the train was not the cause of Mrs. Staley's injury. Other persons that night walked around the same train without harm. In the full possession of her faculties she passed safely around the obstruction and beyond its influence; she was walking in a street in which others were then safely walking; she stepped upon a small pile of ice without necessity. She could, at will, have gone on either side of it; she might have walked between the rails of the unoccupied track, from which the snow and ice had been removed, until she arrived at the usual crossing of Center Street, from which the train (before she had passed around it) had excluded her. The turning to cross that track in order to there cross the street was a voluntary act on her part. It was a selection of one of several convenient routes to her home. We are unable to see any chain of cause and effect leading back from it to the obstructing train. True, if the train had not blocked the way, she would not probably have been at the time in Railroad Street at the point where she decided to cross that street. But so long as the obstructing train did not compel her to take that precise route and step on that pile of ice, in order to reach her home without undue delay, her decision to there attempt to cross that street was in no sense—in no particular—forced by that train; hence it did not cause her fall.

The charge attempted to trace a possible "concatenation" of cause and effect by stating "that if the evidence shows that, prior to the time in question, the agents and servants of the company were in the habit frequently of blocking this same street by its cars unlawfully and negligently, and for more than five minutes, and persons thus prevented from crossing the street were accus-

tomed to pass around the end of the train west of Center Street, down Railroad Street and there cross the tracks and highway substantially as was done by the plaintiff, and these facts were known to the officers and agents of the company, that in such case the jury should determine under such circumstances whether the result which followed to Mrs. Staley might reasonably have been anticipated by the company, the defendant, and if you find that it might, and there was no fault on the part of the plaintiff, the company in that would be liable."

As no evidence tended to show that prior to that night any one fell while passing there, we do not perceive how knowledge by the company that people were in the habit of following the route taken by her, without any fall or injury, would make her fall a "usual and natural" result of the obstruction of Center Street by a train; or that such fall "might reasonably be anticipated by the company."

It seems to us that unless the company was at fault in placing the ice where she trod upon it and fell, no verdict ought to have assessed upon the defendant any damages for that fall.

While we thus hold that the pile of ice was the proximate cause of Mrs. Staley's fall, we agree with the cases cited by her counsel, that in such cases "the question as to whether the cause was remote or proximate is for the jury under the instruction of the court." But we think that the charge as given misled the jury, and that the evidence, as set out in the bill of exceptions, clearly proves that the act of stepping on the ice where she fell was not forced by the train, but was the result of her own choice of route after the train had ceased to be an obstruction to her. The court should apply the law to those facts; and, as we understand it, such application determines that the position of the train was not the proximate cause of the fall.

A demurrer to the petition raised the question whether the latter charged the company with any fault in the matter of the ice. Perhaps it may be construed as averring, in substance, that the blocking of the street compelled her to step upon the ice placed by the defendant, and that while so stepping, under such compulsion, she, without her own fault, fell. If this be so, the demurrer was rightly overruled.

We deem it unnecessary to consider the other alleged errors.

Judgment below reversed and cause remanded for a new trial.

## LOUISVILLE, NEW ALBANY AND CHICAGO RY. Co.

v.

SHIRES, Adm'r.

(108 *Illinois Reports*, 617.)

An ordinance of an incorporated city of another State may be proved by the production of the books in which it is recorded, but a sworn copy is also competent evidence. So where a witness, in his deposition, testified that he was city clerk of the city for the year in which the ordinance was passed, that he wrote the record as such clerk (of which an exhibit attached to his deposition was a copy), that he compared the exhibit with the record, and that the ordinance was published, etc. *Held*, that the witness stated enough to allow the exhibit to be admitted as a sworn copy.

On the trial of an action against a railway corporation to recover damages for a personal injury alleged to have been caused by negligence, the plaintiff called a person who was a practising physician and surgeon, and who was well acquainted with the plaintiff, having met him almost daily for many years, and had been called upon to treat him for the first time when the injury was received, and asked him this question: "What, in your opinion and knowledge of Mr. O.'s previous health and condition, has caused his present illness or disorder, as described by you?" and he answered, "My opinion is, it results from the injury in November last." *Held*, no error in allowing the question to be answered, it appearing the witness had sufficient knowledge upon which to base an intelligent opinion.

In the same case, a witness for the defence, being a practising physician, was asked this question: "Please state what, in your judgment as a physician, is the present malady of the plaintiff, according to the symptoms as given by Dr. Tillottson?" the witness had stated that he had heard Dr. T.'s testimony, and also that the doctor had made a statement of the case to him on the day before: *Held*, that an objection to the question was properly sustained, as it did not call for an opinion on the testimony of Dr. T. as given on the trial, but according to the symptoms given by Dr. T., which also included statements made by him on the preceding day.

A medical expert will not be allowed to testify to an opinion formed upon information derived from private conversations with witnesses in a case. He may examine the patient, and from this give his opinion to the jury. If he has not made a personal examination, then the proper practice is to put a question to the witness reciting the supposed facts hypothetically, upon which the opinion of the expert is wanted.

There is no error in allowing a witness, who has been a brakeman on a train for several years, to state his opinion as to the rate of speed a train was running at the time of an accident.

In an action of trespass on the case, to recover for an injury caused by acts of negligence, it is not proper to instruct the jury that the plaintiff cannot recover unless every material allegation in the declaration is proved. It is sufficient if the plaintiff proves enough of the material allegations of his declaration to make a cause of action.

An objection to the introduction of a foreign statute in evidence, on the ground that it is not set out or given in the pleadings, comes too late when



made in this court for the first time. It should be made in the trial court, so that it may be obviated by amendment.

On the trial of an action brought in this State against a railway company for an injury claimed to have resulted from negligence, the case was tried by both parties on the theory that the doctrine of comparative negligence was applicable, and the defendant asked instructions laying down the rule adopted in this State. On appeal the defendant urged that an instruction given for the plaintiff stating the law of comparative negligence correctly, as expounded by our courts, was erroneous, as not stating the rule as it prevails in the State of Indiana, where the accident and injury occurred: *Held*, that the defendant was by acts precluded from urging such ground of error.

A witness in his deposition, which was taken in the presence of counsel on both sides, testified that an ordinance (an exhibit of which was attached) was, on a certain date, passed by the common council of the city. At the taking of the deposition only a general objection was made to the evidence, and no motion was made to suppress the deposition, or any part thereof, before the trial, on the ground that the passage of the ordinance was proved by parol instead of by the record: *Held*, that by failing to make the specific objection before the trial, so as to afford an opportunity to obviate it, the objection was waived.

Where the question of the incorporation of a city arises collaterally, it is only necessary to show that the city is, *de facto*, a corporation. To prove its existence it is sufficient to produce the charter, and prove acts done under it and in conformity with it. Written proof that all the preliminary steps were taken is not necessary.

To prove the incorporation of a city in the State of Indiana, under a general law conferring power to pass an ordinance sought to be proved, the plaintiff read from the statutes of Indiana an act of March 9, 1857, providing for the incorporation of cities, and prescribing their powers, and also certain sections of an act entitled "An act to repeal all general laws now in force for the incorporation of cities, and to provide for the incorporation of cities, prescribing their powers and rights," etc., which showed authority to pass the ordinance in question, and then proved by a witness that he was city clerk of the city for the year 1879, (the year in which the ordinance appears to have been passed), that the city council passed ordinances, which were published, etc., and also passed the ordinance sought to be proved, and in addition to this all the witnesses, in testifying, spoke of the city as an incorporated city: *Held*, that the evidence was sufficient to show a *de facto* incorporation.

Foreign statutes or the laws of other States must be pleaded, but such statutes are not required to be stated in *hæc verba*. It is sufficient to state the substance of so much of the statute as is relied on, conciseness in pleading being commendable. When the statute is not the foundation of the action, but comes in collaterally as evidence, the same degree of strictness in pleading it is not required.

On the trial of an action for negligence resulting in injury, the defendant asked the court to instruct the jury that the omission of certain acts or duties did not constitute such misconduct as the law would recognize as wanton or wilful. Such negligence was not alleged in the pleadings or claimed on the trial: *Held*, that the instruction was properly refused, for the reason that there was no such issue in the case.

An instruction that the affirmative testimony of witnesses that the bell of a locomotive engine was rung at a given time and place, is of greater force and entitled to more weight than the testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or that they did not hear it ring, and that under such circumstances the jury should give greater weight to such affirmative testimony than to the

negative, is properly refused. It is not the province of the court to tell the jury which evidence is the strongest or entitled to the greater weight.

APPEAL from the Appellate Court for the First District ;—heard in that court on appeal from the Superior Court of Cook County. Judd & Whitehouse and Mr. William Ritchie for the appellant. Edsall, Hawley & Edsall for appellee.

CRAIG, J.—This was an action brought by James G. Ostrander, against the Louisville, New Albany & Chicago Ry. Co., to recover damages for an injury received in Michigan City, Indiana, at the crossing of the railroad track with Franklin Street, on the morning of November 21, 1881. The trial of the cause in the circuit court resulted in a verdict and judgment in favor of the plaintiff, which on appeal, was affirmed in the Appellate Court.

In the first count of the declaration it is averred that Michigan City is a duly incorporated city under the laws of Indiana, and had power to pass ordinances for regulating the speed and management of cars and engines crossing its streets; that by virtue of such power the common council of said city passed an ordinance, which was approved and published as by law required, and was in force at the time of the injury; that said ordinance contained the following:

“Sec. 1. No locomotive or car shall be run faster than six (6) miles per hour within the following limits in said city, viz.: From Chicago Street (or Prison crossing) to the east line of Tail creek.

“Sec. 3. All railroad companies upon track or tracks which cross or intersect the following named streets at the points herein designated, to wit: Franklin Street and Chicago Street (or what is known as Prison crossing), and at all other street crossings where they shall be required so to do by the mayor, shall keep a flagman stationed from six A. M. to nine P. M.: Provided, that when two or more roads so intersect a crossing, they may jointly employ one flagman.

“Sec. 4. Every locomotive or train running in the night-time in said city, shall, while running, keep a brilliant light on the forward end, and some sufficient signal light in charge of some competent person, who shall remain on the rear end of such locomotive or train whenever it is backing.”

It is then averred that the accident occurred after six o'clock in the morning, and before seven o'clock; that no flagman was present at the crossing to warn plaintiff of danger; that the train was running at a rate of speed exceeding six miles an hour; that the bell was not rung or the whistle sounded as the engine approached the crossing. Other averments are found in this count of the declaration, but it will not be necessary to state them here.

In order to prove that there was an ordinance as averred in the declaration, plaintiff offered to read in evidence the deposition of

D. S. Brown. He testified that he was city clerk of Michigan City in 1879, and kept the city records; that he wrote the record, as clerk, of which exhibit "A," attached to his deposition, is a copy; that he compared the exhibit with the record; that the ordinance was published in the "Michigan City Enterprise," a paper published in Michigan City, for two consecutive weeks following its passage. In answer to a question, the witness, in his deposition, stated that exhibit "A" is a copy of an ordinance passed by the common council of Michigan City in 1879. This evidence was objected to by the defendant, but the court overruled the objection, and that decision is relied upon as error. We do not regard the decision erroneous. The ordinance might have been proved by the production of the books in which it was recorded, but a sworn copy was also competent evidence. (1 Greenleaf on Evidence, sec. 508.) Upon an examination of the deposition enough was stated by the witness to bring it within the rule laid down by the author to allow exhibit "A" to be admitted as a sworn copy.

But it is urged that the evidence to prove the passage of the ordinance was incompetent. The witness testified that exhibit "A" was an examined copy, compared with the original record in the office of the city clerk, where the records were properly kept; that the ordinance was passed by the common council of Michigan City, July 14, 1879. This deposition, as appears from the bill of exceptions, was taken in Michigan City, in August, 1882. The attorney of the defendant was present, and made such objections to questions propounded as he saw proper, as to the manner in which the ordinance was proved or passed. Nothing but a general objection was made, and after the deposition had been taken it remained on file about two months before the trial, and no motion was ever made to suppress the deposition, or any part thereof. We think the objection to the evidence, made for the first time on the trial, comes too late. If the defendant was not satisfied with the manner in which plaintiff had proved the passage of the ordinance, he should have entered a motion to suppress that part of the deposition before the trial. If the objection had been made in season, it might have been obviated by producing other proof of the proper passage of the ordinance. But as defendant failed to object before the trial that the passage of the ordinance was proven by parol, when, perhaps, it should have been proven by the records of the common council, the objection was waived. *Cooke v. Orne*, 37 Ill. 186.

It is also contended that there is no proper evidence that Michigan City was a corporation. The question of the incorporation of the city in this case arises collaterally, and it was only necessary to show a *de facto* incorporation. In *Mendota v. Thompson*, 20 Ill. 197, where the question arose collaterally, as here, it was held: "To prove the existence of a corporation it is sufficient to produce

the charter, and prove acts done under it and in conformity with it. Written proof that all the preliminary steps were taken was not necessary." See, also, *Doyle v. Village of Bradford*, 90 Ill. 417.

For the purpose of proving that Michigan City was incorporated, the plaintiff, on the trial of the cause, read from the statutes of Indiana an act of March 9, 1857, providing for the incorporation of cities, and prescribing their powers, etc. The plaintiff also read from the Session Laws of Indiana of 1867, the title of "An act to repeal all general laws now in force for the incorporation of cities, and to provide for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto, approved March 14, 1867," and from which act the following was read:

"Sec. 47. The common council shall hold stated meetings at least twice in each month, and the mayor or any five councilmen may call special meetings. A majority of all members to which the wards are entitled shall be a quorum."

"Sec. 53. . . . The common council shall have power to enforce ordinances. . . . Eighth. To establish and regulate the police of the city. . . . Forty-second. To regulate the speed of railroad trains through the city, and also to provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same, and also to require such corporations to keep clean the gutters and crossings of the streets along which their railways may pass."

Section 56 of the same act confers power to make ordinances, and section 57 provides for the publication of ordinances.

Here was an act of the State under which the city in question might have become incorporated, which conferred the power to pass the ordinance read in evidence. Brown testified that he was city clerk of the city of Michigan City for the year 1879; that the city council passed ordinances which were published in the "*Michigan City Enterprise*," a paper published in the city. He also testified that the common council of Michigan City, on June 14, 1879, passed an ordinance, a copy of which was attached to his deposition. In addition to this, all the witnesses, in speaking of Michigan City, refer to it as an incorporated body. This evidence, where the question arose collaterally, as here, must be regarded as sufficient to establish, *prima facie*, that Michigan City was incorporated under the act of 1867.

It is next contended that the court erred in permitting Dr. Brown to answer the following question: "What, in your opinion and knowledge of Mr. Ostrander's previous health and condition, has caused his present illness or disorder, as described by you?" The witness answered: "My opinion is, it results from the injury

in November last." The objection to the answer, as we understand the argument, is, that the witness was not shown to have had any knowledge of plaintiff's previous condition upon which to base an opinion. The witness, as disclosed by his evidence, was a physician and surgeon. He was called to examine the plaintiff on the morning he was injured. He had not, before the injury, made an examination of the plaintiff, but he had met him almost daily, before the accident, in going to and from his work. If the witness had met the plaintiff almost daily for a number of years, and was well acquainted with him, as is disclosed by his evidence, and was called upon to treat him when he was injured, we think he had sufficient knowledge upon which to base an intelligent opinion as to the cause of his then illness.

It is also claimed that the court erred in allowing the witness Neat to state the rate of speed the train was running at the time of the accident. This witness had been a brakeman on a train for several years, and if any degree of skill is required before a witness can give an opinion as to the rate of speed a train is running at a particular time, he seemed to have been properly qualified.

The statutes of Indiana, act of March, 1857, March 14, 1867, and April 8, 1881, read in evidence by plaintiff, were, as defendant insists, erroneously admitted in evidence, on the ground that they were not pleaded by the plaintiff. There is no doubt in regard to the rule that foreign statutes, or the laws of other States, must be pleaded. As to the act of 1881, the record fails to show that objection was made to its admission on the ground that it had not been pleaded, and as the objection was not made on the trial, when an amendment of the pleadings might have obviated the difficulty, the objection must be regarded as waived by the defendant,—when made for the first time here, it comes too late. As to the other acts, the objection was made at the time they were offered in evidence, and the court held that they were sufficiently pleaded by the plaintiff.

In the first count of the declaration it is averred that Michigan City "was then and there a city, duly incorporated under the laws of the State of Indiana, and under its charter and the laws of the State of Indiana possessed full power and authority to pass all necessary ordinances to regulate the running of trains, cars, and engines upon railroads passing through or within said Michigan City and across the public streets, and to regulate the speed thereof, and to ordain and establish all necessary police regulations respecting the same." The ordinance passed under the authority of the statute was set out *in hæc verba*, but it is claimed that the statute should have been pleaded in the same way. We do not concur in this view of the law. The pleader, in the first count of the declaration, as we have seen, set out the substance of the



statute, which, as set out, showed the authority of the city council to pass the ordinance in question. The substance of the act relied upon, clearly stated, is all that could be required. Conciseness in pleading is always commendable. If the statute relied upon had been set out *in hæc verba*, the defendant could not have been any better prepared to meet the case made by plaintiff than he was under the averment which set out the substance and legal effect of the statute. Why, then, incumber the record by setting out the entire statute, when an averment of its substance and legal effect gave ample notice that the statute would be relied upon? In 1 Chitty on Pleading, 216, in discussing this subject, it is said: "The courts will not, *ex officio*, take notice of private acts of parliament, and consequently such parts of them as may be material to the action or defence must be stated in the pleading." In *Walker v. Maxwell*, 1 Mass. 113 (a case cited by appellant), it is said: "The plea ought to have set forth the statute, . . . that the court might see whether the proceedings stated in the plea were authorized by the statute. . . . The general allegation that those proceedings were pursuant to the statute . . . in such case made and provided, was not sufficient." We fully concur in the view taken in that case, but the question here involved is entirely different. In this case the substance and legal effect of the statute was set out, which was not done in the case cited. But it will not be necessary to examine other cases cited. We think the statutes of Indiana were sufficiently pleaded. *Stacy v. Baker*, 1 Scam. 418; *Hyman v. Bayne*, 83 Ill. 258. Had the action been brought on a statute, more strictness might be required in pleading the statute, but such is not the case. Here the statute is not the foundation of the action, but it comes in question collaterally, as evidence in the case.

It is also contended by counsel for appellant, that the court erred in refusing to permit Dr. Hunter to answer the following question: "Please state what, in your judgment as a physician, is the present malady of the plaintiff, according to the symptoms as given by Dr. Tillottson." The witness had stated that he had heard Dr. Tillottson's testimony, and also that the doctor had made a statement of the case to him on the day before. The question put to the witness did not call for his opinion on the testimony of Dr. Tillottson, as given on the trial, but according to the symptoms given by the doctor, which included statements as well, made on the previous day. We are not aware that it has ever been held that a medical expert has the right to testify to an opinion formed upon information derived from private conversations with witnesses in the case, and we are not inclined to adopt a rule of that character. A medical expert may examine the patient, and from such personal examination give his opinion to the jury. If the medical expert has not made a personal examination of the patient, then the proper



practice is to put a question to the witness reciting the supposed facts hypothetically, upon which the opinion of the expert is wanted. 1 Greenleaf on Evidence, sec. 440.

The court gave one instruction for the plaintiff which it is conceded in the argument correctly states the law of comparative negligence as it exists in this State, but it is urged that the law of this State is not applicable to a case where an injury was received in Indiana, and hence it is urged that the instruction was erroneous. We shall not stop to determine whether this case should be controlled by the law of Indiana or not, as we are of opinion that the defendant is precluded by his own instructions from raising this question. In defendant's instruction No. 4, at his request the court instructed the jury as follows: "In case of negligence by both parties, resulting in such injury, the question to be determined by the jury, from the evidence, is, did the negligence of the plaintiff materially contribute to the injury, or was it so slight, and that of the defendant so gross in comparison, as to incline the balance in his favor." Again, in defendant's instruction No. 18, the jury were told, "if the negligence of the plaintiff materially contributed to the injury, then he cannot recover unless his negligence was slight and that of the railroad company so gross in comparison as clearly to preponderate." The case was tried on the theory, by both parties, that the doctrine of comparative negligence was applicable to it. The jury were so instructed at the instance of the defendant, and he cannot now complain of an instruction given for the plaintiff, which only announces the same rule which he himself caused to be laid down to the jury. *McGonigle v. Dougherty*, 71 Mo. 259.

The court refused defendant's ninth instruction, and this is relied upon as error. The substance of the instruction was, that the omission of a duty enjoined by law on defendant, such as the absence of a flagman from a railroad crossing, did not constitute such misconduct as the law would recognize as wanton or wilful. It was not alleged in the declaration or claimed on the trial that the conduct of the defendant was wilful or wanton,—indeed, there was no issue of that character in the case,—and for this reason, if for no other, the instruction may be regarded as improper. It was not only proper, but the duty of the court, to confine the instructions to the questions properly involved in the case.

The court refused instruction No. 11, which declared: "In no event can the plaintiff recover unless every material allegation of the declaration is proven by a preponderance of the evidence to be true." This was an action on the case,—a tort,—and the plaintiff was not bound to prove every material averment of his declaration. If the plaintiff proved enough of the material allegations to make out a cause of action, he would be entitled to recover, although all the material averments were not proven. The instruction was wrong, and the court did right in refusing it.

The court also refused instruction No. 13, as follows:

"The jury are further instructed that the affirmative testimony of witnesses that the bell of a locomotive engine was rung at a given time and place, is of greater force and is entitled to more weight than the testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or that they did not hear it ring, and under such circumstances the jury should give greater weight to such affirmative testimony than to the negative."

A similar instruction was condemned by this court in *Rockwood v. Poundstone*, 38 Ill. 200. It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence, and determine for themselves what the weight of evidence may be. We do not understand that it was the province of the court to tell the jury which evidence was the strongest, or which is of greater force. The instruction was wrong, and properly refused.

It is also urged that the damages are excessive. That is a question of fact which was proper for the consideration of the Appellate Court, but under the rulings of this court it is not reviewable here.

The judgment will be affirmed.

Judgment affirmed.

**Expert Evidence of Surgeon as to Cause and Nature of Injury.**—In an action against a railroad company for an injury alleged to have been occasioned by a railroad accident, the evidence of a physician is admissible to show whether or not in his opinion the injury complained of proceeded from such cause. *Matteson v. New York Central R. Co.*, 35 N. Y. 487; *O'Mara v. Commonwealth*, 75 Pa. St. 424; *State v. Clark*, 15 S. C. 403. The peculiar nature and character of injuries inflicted by railroad accidents may be testified to by physicians. *Taylor v. Railway*, 48 N. H. 304.

**Expert Evidence as to Duration of Injury.**—Expert evidence is also admissible as to whether the injury inflicted is likely to be permanent or not. *Matteson v. New York Central R. Co.*, 62 Barb. 364; s. c., 35 N. Y. 487; *Filer v. New York Central R. Co.*, 49 N. Y. 42; *Lincoln v. Saratoga & S. R. Co.*, 23 Wend. 425; *Kansas Pac. R. Co. v. Pointer*, 9 Kans. 620.

**Expert Evidence as to Merits of Treatment.**—Expert evidence is not admissible as to the merits of the treatment to which the injury has been subjected. *Muldowney v. Illinois Central R. Co.*, 39 Iowa, 615.

**Who is Competent as Medical Expert.**—A physician who has studied the subject of medicine and is a practitioner, is competent as an expert, though he may never have received a diploma. *New Orleans, etc., R. Co. v. Allbretton*, 38 Miss. 247.

**Upon what Experts Opinion must be Based.**—The opinion of an expert on a given case must be founded either on personal examination and knowledge or upon a hypothetical case stated to him in court based on facts adduced in evidence. *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537; *Perkins v. Railroad*, 44 N. H. 223; *Hurst v. Chicago, etc., R. Co.*, 49 Iowa 76; *Filer v. New York, etc., R. Co.*, 49 N. Y. 42; *Grand Rapids & Ind. R. Co. v. Martin*, 41 Mich. 667; *New York, etc., R. R. Co. v. Dougherty & Am. & Eng. R. R. Cas.* 139.

**Statements of Patient.**—A physician may be guided in reaching his opinion

by what his patient tells him, but cannot give such statements in evidence in lieu of an opinion. *Illinois Central R. R. Co. v. Sutton*, 43 Ill. 438; *Murphy v. New York Central R. R. Co.*, 66 Barb. 125; *Atchison, etc., R. Co. v. Frazier*, 8 Am. & Eng. R. R. Cas. 72.

**Submission of Person to Experts.**—In a proper case the plaintiff will be obliged to submit his person to the examination of competent experts who will report upon his physical condition. *Atchison, T. & S. F. R. Co. v. Thul*, 10 Am. & Eng. R. R. Cas. 783; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375.

Where there is, however, already abundant and competent evidence on both sides as to the question, such an examination will not be allowed. *Loyd v. Hannibal & St. Jo R. R. Co.*, 53 Mo. 509.

In an action against a railroad company to recover damages for a personal injury, the plaintiff is at liberty if he pleases to exhibit the injured limb to the jury so that a surgeon may demonstrate the nature and character of the injury. *Muchado v. Brooklyn City R. R. Co.*, 30 N. Y. 370.

**Relative Weight of Affirmative and Negative Evidence as to Signals.**—Upon the subject of the relative weight of affirmative and negative evidence as to the sounding of signals at crossing, see *Chicago & Alton R. R. Co. v. Robinson*, and note, with full citations of authorities, *infra*.

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## CHICAGO AND ALTON R. R. Co.

v.

ROBINSON.

(106 *Illinois Reports*, 142.)

An instruction directing the attention of the jury to an element of liability not shown by the pleadings or evidence in the case, is calculated to mislead, and is erroneous. It is not proper to direct the attention of the jury to matters not in issue.

It is obvious error for the court to announce to the jury what is the better evidence in a case, or what the jury may so regard. It is the province of the jury to say to what evidence they will attach the greater weight in case of a conflict, and with this right or privilege the court should not interfere.

An instruction which assumes the existence of material facts, without which the plaintiff cannot recover, some of which are matters of contention between the parties, is erroneous.

In an action against a railroad company to recover for an injury caused by a collision with a buggy while crossing the railroad, the court instructed the jury, in substance, that it was the duty of the railroad company, when its trains were about to cross a highway on a common level, to give "due warning," so that a person travelling on the highway with a team and carriage might stop and allow the train to pass. *Held*, that the instruction ought not to have been given, as it might have led the jury to believe that the company was bound to do more than to ring a bell or sound a whistle.

In a suit against a railroad company for negligence in not giving the statutory signals on approaching a road-crossing with a train, the jury are not, as a matter of law, justified in giving greater weight to the testimony of

witnesses who state negatively that no bell was rung or whistle sounded, than to that of witnesses stating affirmatively that this was done. The rule would seem to be the other way.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Tazewell County.

C. Beckwith, N. W. Green, and M. D. Beecher for the appellant.

B. S. Prettyman & Sons and William Don Maus for the appellee.

SCOTT, C. J.—This action was brought by Amelia T. Robinson, against the Chicago & Alton R. R. Co., to recover for personal injuries. Plaintiff, with her husband, was travelling on the highway in a buggy, and just as they were crossing the track of defendant's railroad, at a public road crossing, a special train, under the management and control of defendant's servants, collided with the buggy in which plaintiff and her husband were riding, by which she sustained severe and permanent injuries. The negligence with which defendant is charged, and which, it is averred, caused the injuries to plaintiff, consists in a failure to ring a bell or sound a whistle on the locomotive that caused the injury, as the law requires shall be done at all public road crossings, and in permitting banks of earth to lie, and weeds, brush and other obstructions to stand and grow at and along its track and grounds, so near the crossing as to prevent and obstruct a view of approaching trains by any one travelling on the highway and about to cross the railroad, in time to avoid danger. It is also made a ground of complaint that the train which collided with the buggy in which plaintiff was riding was what is called a "wild train,"—that is, a train run upon no schedule time,—and that it was run at an unusual rate of speed.

With the testimony to be found in the record this court will not concern itself, further than to ascertain whether the law given by the trial court to the jury, in its instructions, was applicable to the evidence. With that purpose in view the evidence has been carefully considered, and it is found that some of the instructions given for plaintiff were calculated to mislead the jury, conceding, as must be done, the facts were well found by the Appellate Court. There is and can be no pretence that the injuries of which plaintiff complains were wilfully inflicted by defendant's servants. The utmost that can be claimed on any hypothesis consistent with the evidence, is, that her injuries resulted from the negligence of defendant's servants in permitting obstructions along the line of its right of way so near the crossing as to obstruct the view of approaching trains by any one travelling on the highway, or from the negligent conduct of defendant's servants in charge of the train that produced the injury, by which it was unskillfully managed, or from the omission to give the usual signals of danger. Neither the declaration nor

the ascertained facts show any wilful intent on the part of defendant's servants to inflict an injury upon plaintiff. That element is absolutely wanting in any view that can be taken of the case. Indeed, defendant is not charged with any such intent, and no such issue could be rightfully submitted to the jury. Hence, it is thought the second instruction of the series given for plaintiff was calculated to and may have misled the jury as to the true issues involved. The clause of the instruction bearing on this phase of the case is, "where the jury believe, from the evidence, an injury is wilfully done by a railroad company, or results from a gross neglect of duty by the company, then the company is liable for such injury." The charge, it will be perceived, directs the attention of the jury to an element of liability in the case made neither by the pleadings nor the evidence, and coming, as it did, from the court, the jury might believe it was warranted by the testimony, and must, therefore, have been most hurtful to the defence. Any instruction that directs the attention of the jury to an issue not involved, is erroneous, and may be the means of producing a verdict warranted neither by the law nor the evidence. This charge is justly subject to criticism in this respect, and ought not to have been given.

But the first clause of the fourth instruction is still more objectionable. It is as follows: "In an action against a railroad company alleging negligence in not sounding the whistle or ringing a bell on approaching a road crossing, a jury may be justified in giving greater weight to the testimony of witnesses who state negatively that the whistle was not sounded or the bell rung, than to that of witnesses stating affirmatively that such was done." That which follows in the same charge in no way qualifies or explains the proposition stated. As expressed, the proposition is not the law. It is obvious error for the court to pronounce as to what is the better evidence in the case, or as to what the jury may so regard. It is the province of the jury to determine as to what evidence they will give the greater weight, and their privilege in that regard should not be interfered with by the court. But a more serious objection is, it is not true, as a matter of law, as this charge seems to hold, that in such cases greater weight may be given to the testimony of witnesses "who state negatively that the whistle was not sounded or the bell rung, than to that of witnesses stating affirmatively that such was done." Cases in this court that hold a doctrine different from that stated in the instruction quoted, are numerous and consistent. *Frizell v. Cole*, 42 Ill. 362; *Chicago, Burlington & Quincy R. R. Co. v. Stumps*, 55 Id. 367; *Chicago & Alton R. R. Co. v. Gretzner*, 46 Id. 74; *Chicago, Burlington & Quincy R. R. Co. v. Dickson*, 88 Id. 431; s. c., 2 Am. & Eng. R. R. Cas. 538. These cases all hold that concerning such matters as are involved in the case being considered, positive testimony is

entitled to more weight than negative evidence in that respect. Conceding the facts to be as found by the trial court, it is not a case where negative evidence can be regarded as of equal dignity with positive testimony. The instruction was, therefore, highly calculated to produce a verdict not warranted by the law.

The fifth instruction for plaintiff is justly subject to the criticism that it assumes the existence of material facts, without which plaintiff could not recover in any event, some of which are matters of contention between the parties. It is for that reason erroneous. *Bradley v. Coolbaugh*, 91 Ill. 148. The substance of plaintiff's seventh instruction is, that it is the duty of the railroad company, when its trains are about to cross a highway on a common level, to give "due warning," so that a person travelling on the highway with a team and carriage may stop and allow the train to pass. Exactly what is meant by "due warning," is not readily understood. The servants of a railroad company, when approaching a public road crossing, are required to give the statutory signals of danger,—that is, to sound a whistle or ring a bell. These signals are well understood by every one, and they constitute all the "warning" the law requires the servants on the train to give. It may be the jury understood the words "due warning," to mean more than what the statute requires, and if so, it made an erroneous impression, and ought not to have been given.

It may be some criticism may be justly made on other instructions given for plaintiff, but it is not deemed necessary to remark upon them. If it shall be perceived any errors have intervened, the same will doubtless be corrected on another trial, by the court, on its attention being called to them.

For the errors indicated the judgment of the Appellate Court will be reversed, and the cause remanded to that court, with direction to reverse the judgment of the circuit court and remand the cause for a new trial.

Judgment reversed.

MR. JUSTICE DICKEY.—I concur in the conclusion reached, but not in all the positions taken.

**Positive and Negative Evidence as to Giving Signal at Crossing.**—It has been in some cases held that where there is affirmative evidence that a whistle was sounded or bell rung on approaching a crossing, and there is negative evidence to the effect that the witnesses did not hear it, the jury should be instructed that supposing the witnesses to be equally credible the affirmative evidence must be taken to outweigh the negative. *Savannah & M. R. Co. v. Shearer*, Adm'r, 58 Ala. 672; *Sutherland v. New York Central & H. R. R. Co.*, 41 N. Y. Superior Ct. 17; *Chapman v. N. Y. Central & H. R. R. Co.*, 14 Hun (N. Y.), 484; *Culhane v. New York Central, etc., R. Co.*, 60 N. Y. 133; *Telfer v. Northern R. Co.*, 80 N. J. L. 188-194; *Chicago & R. I. R. Co. v. Still*, 19 Ill. 499; *Rockford, R. I. & St. L. R. Co. v. Byam*, Adm'r, 80 Ill. 528; *Ellis v. Great Western R. Co.*, L. R. 9 C. P. 551.

**When Rule Inapplicable.**—But the circumstances of the case, and particu-



larly the opportunity which the negative witnesses have had to hear the signal, often materially modify this rule so as to leave the question whether or not the signal has been given an open one for a jury. *Urbanck v. Chicago, M. & St. P. R. Co.*, 47 Wisc. 59; *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 481; *Berg v. Chicago, M. & St. P. R. Co.*, 50 Wisc. 419; s. c., 2 Am. & Eng. R. R. Cas. 70.

**When Evidence deemed Conflicting.**—Where there is evidence that the signal has been given, and the negative witnesses having been in a position to hear it swear positively not merely that they did not hear it, but that it was not given, the rule above laid down has no application. A question of veracity between the witnesses is raised which it is the province of the jury to decide. *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Voak v. Northern Central R. Co.*, 75 N. Y. 320; *Renwick v. New York Central R. Co.*, 36 N. Y. 132; *Byrne v. New York Central & H. R. R. Co.*, 14 Hun (N. Y.), 322; *Chicago, B. & Q. R. Co. v. Lee*, 67 Ill. 454; *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, 108 Ill. 617; s. c., *supra*, 387.

In cases where the evidence is conflicting it is of the utmost importance that the jury should receive absolutely correct instructions as to the duty of the railroad company. *Chicago, B. & Q. R. Co. v. Dougherty*, 110 Ill. 521; s. c., *supra*, 292.

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### WALDELE, ADMINISTRATRIX,

v.

### NEW YORK CENTRAL AND HUDSON RIVER R. R.

(95 *New York Reports*, 275.)

Declarations of a party deceased as to the facts of an accident killing him which consist merely of a narrative of the transaction as past are not admissible in evidence as part of the *res gestæ*.

In an action to recover damages for alleged negligence, causing the death of J., plaintiff's intestate, it appeared that about midnight a freight train passed a street crossing on defendant's road, followed, about fifty feet distant, by an engine going backward. Shortly after their passage J. was found lying near the track fatally injured. No one saw the accident. Plaintiff's theory was that J., who was an educated deaf-mute, well acquainted with the locality, approached the track on his way home, waited for the freight train to pass, and then in attempting to cross was struck by the engine. A witness for plaintiff was permitted to testify to declarations made by J. by means of signs about thirty minutes after the accident, to the effect that there was a long train; that he waited for it to go by, and was struck by an engine which followed. *Held*, error.

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, in favor of plaintiff, entered upon an order made January 9, 1883, which reversed an order of Special Term, setting aside a verdict for plaintiff, and directing a new trial. (Reported below, 29 Hun, 35.)

This action was brought to recover damages for alleged negligence, causing the death of John E. Waldele, plaintiff's intestate.

The facts, so far as material, are stated in the opinion.

Edward Harris for appellant.

Wm. S. Oliver for respondent.

EARL, J.—The intestate came to his death from injuries received on defendant's railroad in the city of Rochester, near midnight, July 1, 1876. He was an educated deaf-mute, intelligent, and in possession of all his faculties, except that of speech and hearing. He was familiar with the railroad at the place where he was injured; and was probably attempting to cross the railroad on his way home at the time he was struck by an engine and fatally injured. No one saw the accident; but the theory of the plaintiff is, that as he approached the railroad tracks, a freight train came from the east, and he waited for that to pass, and then started to cross the track and was struck by an engine backing in the same direction at a distance of about fifty feet in the rear of the train. The manner of the accident, and whether it was caused solely by the negligence of the defendant, without any contributory negligence on the part of the intestate, were matters of controversy at the trial. The evidence to support the theory of the plaintiff was all circumstantial, except declarations of the intestate which were read in evidence.

Shortly after the passage of the train and the engine, the groans of the intestate were heard, and he was found lying upon the southerly or outer track of the railroad, about fifteen feet from the sidewalk, badly bruised and mangled. He was soon removed to the sidewalk, and afterward to the hospital, where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf-mute, was sent for; and about thirty minutes after the accident, he there obtained from him, by signs, the declarations the reception of which in evidence are complained of as error. He was produced by plaintiff as a witness and was asked, "What did he tell you?" To this defendant's counsel objected, on the grounds "(1) that the declarations of the deceased are incompetent, (2) that they are no part of the *res gestæ* (3) that whatever the conversation may have been, it took place at a time considerably subsequent to the time of the injury, at a place other than where the injury occurred, and (4) that the evidence is inadmissible for any purpose." The court overruled the objections, and the defendant's counsel excepted. The counsel further objected to the reception of the evidence, "upon the ground that the declarations of the deceased are not competent for the purpose of establishing either negligence on the part of the defendant, or absence of negligence on the part of the deceased." The court overruled the objection, and defendant's counsel again excepted. The witness then answered: "John said he got hit! John said there was a long train, that he stood waiting for it to go, and an engine followed

and struck him." The counsel in objecting to this evidence, and the court in ruling upon the objections, must have known what evidence was sought to be elicited by the question, as the case had before been tried, and the same evidence had been given. (19 Hun, 69.) It is not disputed that this evidence was quite material, and we cannot say that it was not very damaging to the defendant upon a vital issue. Was it competent? We think not.

The claim that the declarations can be treated as part of the *res gestæ* is not supported by authority in this State. The *res gestæ*, speaking generally, was the accident. These declarations were no part of that—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations or by which upon cross-examination of the witness testifying, or by the examination of other witnesses, the truth of the declarations could be tested.

It is not easy always to determine when declarations may be received as part of a *res gestæ*, and the cases upon this subject in this country and in England are not always in harmony. The case of *Commonwealth v. McPike*, 3 Cushing, 181, and *Insurance Company v. Mosley*, 8 Wall. 397, are extreme cases upon one side, and would justify the reception of these declarations. The case of *Regina v. Bedingfield*, 14 Cox's Cr. Cases, 341, is an extreme case upon the other side, and goes much farther than would be needed to justify the exclusion of these declarations. The case was decided by Lord Chief Justice Cockburn, after consulting with Field and Manisty, JJ., and aroused much discussion and criticism in England. *Bedingfield's Case*, 14 Am. Law Review, 817; 15 Id. 71.

The rule as to *res gestæ* laid down in *Commonwealth v. McPike*, has since been limited, and very properly applied in other cases in that State. In *Lund v. Tyngsborough*, 9 Cush. 36, in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gestæ*, the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined, and among other things said: "When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the con-

temporary declarations as a part of the transaction to explain the particular fact distinguish this class of declarations from mere hearsay;" and further: "Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporaneous with it, and derive some degree of credit from it." In *Commonwealth v. Hackett*, 2 Allen, 136, upon a trial for murder, a witness testified that, at the moment the fatal stabs were given, he heard the victim cry out "I am stabbed," and he at once went to him and reached him within twenty seconds after that, and then heard him say "I am stabbed—I am gone—Dan Hackett has stabbed me." This evidence was held competent as part of the *res gestæ*. Bigelow, Ch. J., speaking of this evidence, said: "If it was a narrative statement, wholly unconnected with any transaction or principal fact, it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed instantly, after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporaneous with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*." The learned judge also said that the rule which renders *res gestæ* competent has been often loosely administered by courts of justice so as to admit evidence of a dangerous and doubtful character; and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony; and that that court was disposed to apply the rule strictly, and to exclude everything which did not clearly come within its just and proper limitations. In these cases (the last two) I think the rule under consideration was correctly laid down and applied, and properly defined and limited. In *Rockwell v. Taylor*, 41 Conn. 55, the rule was laid down thus: "To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain;

and to so harmonize with them as to constitute a single transaction." In *Hanover R. R. Co. v. Coyle*, 55 Penn. St. 396, the action was against a railroad company for injuring the plaintiff by negligence; and the trial court admitted declarations of the engineer by whose negligence the plaintiff was injured, made at the time of the injury as part of the *res gestae*; and it was held that they were properly admitted. Agnew, J., writing the opinion and speaking of the declaration of the engineer, said: "It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes; and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself."

Without further calling attention to cases outside of this State, I will now refer to a few cases decided by this court in further illustration of this rule. In *Moore v. Meacham*, 10 N. Y. 207, the plaintiff sought to show his own declarations, while performing, or endeavoring to perform, his agreement, for the purpose of characterizing the agreement itself, and they were held incompetent. Gray, J., writing the opinion, said: "The general rule is that declarations, to become a part of the *res gestae*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction." In *Luby v. H. R. R. Co.*, 17 N. Y. 131, the action was for alleged negligence in running a railroad car, drawn by horses, against the plaintiff in one of the streets of the city of New York. Upon the trial he was allowed to prove that, immediately after the accident, a policeman arrested the driver of the car, and that upon arresting him as he was getting off the car, and out of the crowd which surrounded him, he asked why he did not stop the car; to which the driver replied that the brake was out of order. This evidence was objected to on the part of the defendant. The plaintiff recovered a judgment which was affirmed by the Supreme Court at General Term. The defendant then appealed to this court, and the judgment was reversed on two grounds—(1) because proof of the arrest was allowed; (2) because the declaration of the driver was received. Upon the latter ground, Comstock, J., writing the opinion, said: "The declarations of an agent or servant do not, in general, bind the principal. Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal if made at the same time, and so that they constitute a part of the *res gestae*. To be admissible they must be in the nature of original and not hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance



of the agency, but in regard to a transaction depending at the very time;" and further: "The declaration was no part of the driver's act, for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done." In *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 100, the plaintiff was ejected from the cars of the defendant on his way from Utica to Albany, at St. Johnsville, by the conductor, because he did not then have a ticket, and was unwilling to pay his fare. He then paid his fare under protest, and re-entered the car, and went to Albany. Shortly after reaching Albany he went to the conductor, and, with the assistance of the person who had acted as conductor west of Utica, satisfied him that he had paid his fare, whereupon the conductor refunded the fare to him; and he was allowed to prove, against the objection of the defendant, a conversation then had between him and the conductor, in which the latter applied to him very slanderous and abusive epithets, as a part of the *res gestae*. The Commission of Appeals held that that evidence was erroneously received, and reversed the judgment and granted a new trial, holding that that conversation, although it took place at the time the conductor refunded the fare, was not part of the *res gestae*, in a suit to recover damages for being ejected from the cars at St. Johnsville. In *Whitaker v. Eighth Ave. R. R. Co.*, 51 N. Y. 295, the action was brought to recover damages for an injury caused by the wilful act of one of the defendant's car drivers in running one of its cars against the plaintiff, and throwing him into an excavation by the side of the track; and the plaintiff, in order to sustain his allegation of the driver's intention to do him an injury, was permitted to prove by a witness that immediately after the car passed he heard the driver cursing and damning the plaintiff, saying, "Let him fall in and be killed." The trial judge held that the declaration was a part of the *res gestae*, and, therefore, admissible. The evidence was objected to on the part of the defendant, and the Commission of Appeals decided that it was error to receive it; and for that and other reasons reversed the judgment and granted a new trial, holding that the declaration made by the driver after the car had passed, and the injury was done, was no part of the *res gestae*. In *People v. Davis*, 56 N. Y. 95, upon an indictment under the statute against abortions, the woman upon whose person the abortion was attempted being dead, the district attorney was permitted to prove that she went away with the defendant in a buggy, and returned in the night, and what on her return she said to a witness had been done and said to her by the doctor who performed the operation upon the alleged procurement of the defendant. This evidence was objected to on the part of the defendant, and the General Term reversed the judgment of conviction by the



Oyer and Terminer. The case was then brought into this court by writ of error on behalf of the people; and the decision at the General Term was affirmed, this court holding that the declarations proved were simply a narrative of a past transaction, and not competent as part of the *res gestae*. Grover, J., writing the opinion of the court, said: "In this case the thing done, or *res gestae*, was at the doctor's office in another town, and it is clear that its narration by the deceased was no part of that thing. Anything said accompanying the performance of an act, explanatory thereof, or showing its purpose or intention, when material, is competent as a part of the act. But when the declarations offered are merely narratives of past occurrences they are incompetent. That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and, therefore, no part of the *res gestae*;" and speaking of the case of the Ins. Co. v. Mosley, *supra*, he said that the doctrine as to what may be regarded as a part of the *res gestae* was certainly carried to its utmost limit in that case by the majority of the court. And he further very appropriately said: "The length of time between the act and its subsequent narration by one of the actors I do not regard as material. The question is, did the proposed declaration accompany the act, or was it so connected therewith as to constitute a part of it? If so, it is a part of the *res gestae* and competent; otherwise, not."

In *Tilson v. Terwilliger*, 56 N. Y. 273, Folger, J., lays down the rule as to *res gestae* declarations as follows: "To be a part of the *res gestae* they must be made at the time of the act done, which they are supposed to characterize; they must be calculated to unfold the nature and quality of the acts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of coexisting motives." In *Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518, it was held, as stated in the head note, that "the testimony of a witness as to what occurred after the accident was competent as part of the *res gestae*;" but it was so held for the reason that the occurrences there referred to constituted a part of the transaction. A child had been run over, and on the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted as a witness for the plaintiff to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The evidence was clearly competent as a part of the *res gestae*.

The counsel for the plaintiff, in his argument before us to justify this evidence, cited but two cases from the reports of this State:

*Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186, and *Schnicker v. People*, 88 N. Y. 192. In the first case it was held that in an action upon a policy of life insurance, issued upon the life of one person for the benefit of another, evidence of declarations made to third parties by the insured at a time prior to, and not remote from, that of his examination and in connection with facts, or acts, exhibiting his then state of health (for instance, declarations made by him when apparently ill, as to the nature or cause of his illness) is competent upon the question as to the truthfulness of statements made by him to the examining physician, as to his knowledge that he had, or had not had, a certain disease, or symptoms of it. It is difficult to perceive how anything decided in that case, or stated in the opinion of the court, can have any material bearing upon this. In the second case, Schnicker was indicted for the offence of taking a woman, unlawfully against her will, with the intent to compel her by force, menace, or duress to be defiled. The evidence tended to show that the prosecutrix went to a house of prostitution kept by the prisoner, not knowing the character of the house, for the purpose of obtaining employment as a domestic; that the prisoner detained her there by exciting her fears that if she left she would be arrested, and by keeping the outer door locked; that the prisoner plied her daily with solicitations to consent to the defilement of her person, but she refused; that finally the prisoner told her to go upstairs with a man, and upon her refusal, opened the door of the room where she was and shoved her into the hall, whereupon she went upstairs to her room, and in a half hour after a man called the "boss" came to her room with another man and left him there, and this man by force defiled her: and it was held that the evidence as to what occurred in the room of the prosecutrix was properly received; that the occurrence was part of the *res gestae*, and might reasonably be inferred to have been in pursuance of the scheme of the prisoner to subject the prosecutrix to defilement. Judge Andrews, writing the opinion of the court, said: "We think the evidence was competent. It was so closely connected in point of time with the direction of the prisoner, that the prosecutrix should go to her room with a man, as to constitute a part of the *res gestae*, and what followed might reasonably be inferred to have been in pursuance of the scheme of the prisoner to subject the prosecutrix to defilement." That case furnishes no support for the claim of the plaintiff, that the declarations in this case were properly received.

I have now called attention to the principal authorities in this State, upon the doctrine of *res gestae* evidence, and I have examined all the other cases which have been reported in this State relating to the doctrine, and I confidently assert that there is no authority in this State for holding that this evidence was competent. Here the *res gestae*, strictly and accurately speaking, was not the fact that

the intestate was injured, nor the fact that he was injured by coming in collision with the engine. These facts were apparent and undisputed. But the point of inquiry was, how he came to be hit by the engine, with the view of ascertaining whether the accident was solely due to the negligence of the defendant, or partly, or wholly due to the negligence of the intestate. The manner of the accident was, therefore, the *res gestae* to be inquired into; and these declarations made after the accident had happened, after the train had passed from sight, and the whole transaction had terminated, were no part of that *res gestae*, had no connection with it, and were purely narrative. It has been well said, that *res gestae* must be a *res gestae* that has something to do with the case, and then the declaration must have something to do with the *res gestae*. It cannot be said that these declarations were in such manner connected with the *res gestae* as to constitute one transaction so that they and the *res gestae* were parts of the same transaction. They were not made under such circumstances that they are in any way confirmed by the *res gestae*, and they had no relation to what was then present, or had just gone by. Suppose the intestate had been found at that point with a mortal wound freshly inflicted by some person; and he had charged that an individual, naming him, had thirty minutes before caused the wound; would that declaration have been competent upon the trial of the person thus charged with the murder? Clearly not, within principles laid down in the cases which I have cited. Suppose in this case the person had been found there with a wound upon his head; and he had stated that the engineer upon one of these engines had struck him, as the engine passed, and the engineer had been upon trial for the offence; would the declaration have been competent? It makes no difference that the intestate had died, and could not therefore be called as a witness. If these declarations were competent, they would have been no less competent if he had survived and brought the action himself, and had been a witness upon the trial. Suppose the engineer upon the engine which struck the defendant had, at the precise time when these declarations were made, also made declarations either favorable or unfavorable to the defendant, could they have been given in evidence as a part of the *res gestae*? In view of the authorities which I have cited, that will not be claimed, and yet if these declarations were competent, those made at the same time by the engineer would have been competent; and this illustrates, too, how important it is that a correct rule upon this subject should be laid down in this case.

This evidence cannot be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. The probability would have been equally strong if they had been made several hours later when he was removed to the hospital. The probability is that as he neared his death he

would have told the truth, if he said anything about it. The same may be said of many statements not under oath. They are frequently made under such circumstances as entitle them to very great, and frequently to implicit confidence; and yet they do not answer the requirements of the law—that a party prosecuted shall be confronted with the witnesses, shall have an opportunity of cross-examination, and that the evidence against him shall be given under the test and sanction of a solemn oath. Declarations which are received as part of the *res gestae* are to some extent a departure from or an exception to the general rule; and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. They then depend entirely upon the credit of the person making them and of the persons who testify to them, and hence are of no more value as evidence in a legal proceeding than the unsworn declarations of a person under any other circumstances.

Even dying declarations are not received in civil actions unless part of the *res gestae*. Such declarations made in the immediate presence of death, under the most solemn circumstances, when all motive to pervert the truth may be supposed to have ceased to operate, are received only in trials for homicide of the declarant in cases where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. It is said that the reasons for thus restricting the rule may be that credit is not in all cases due to the declarations of a dying person, for his body may survive the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or for the sake of ease, and to be rid of the importunity and annoyance of those around him, he may say, or seem to say, whatever they may choose to suggest. The rule admitting dying declarations as thus restricted stands only upon the ground of the public necessity of preserving the lives of the community by bringing man-slayers to justice. (Greenl. on Ev., §156.)

There is no middle ground for receiving declarations of this character—that is, they must be received either as dying declarations or as declarations forming part of the *res gestae*.

But it is said that although this evidence may have been incompetent to show how the accident happened, it was competent to explain the condition of the intestate at the time he made the declarations. It is clear, however, that they were not received for that purpose. There was no dispute about his condition. It was not questioned that he was badly mangled and bruised, and that his injuries were received upon the defendant's railroad by contact with one of its engines; and so far as the declarations tended to

show that he was simply hit by an engine, and received his injuries in that way, they were wholly unnecessary and immaterial. The sole point of the evidence was to show that he approached the track, waited for a long train to pass, and then, in attempting to cross the track, was struck by an engine backing in the same direction, thus making a question for the jury as to the contributory negligence on his part. For that purpose the evidence was incompetent, and that was the sole purpose, manifestly, for which it was offered or received. Suppose the intestate had been found there with a mortal stab inflicted half an hour before, and he had said, "I am stabbed; John Doe did it!" and the evidence had been objected to and received, would it have been an answer to say that it was competent to show his then present condition, and that the whole evidence should not, therefore, have been excluded? The stab would have been apparent, and the declarations wholly immaterial and unnecessary to show it, and the sole purpose and effect of the evidence would have been to show who the murderer was. So here the evidence was given for the sole purpose of showing what took place at the time the intestate was injured, and not for the purpose of characterizing his condition at the time he spoke.

We are, therefore, of opinion that an important rule of evidence was violated in receiving these declarations, and that upon that ground the judgment should be reversed and a new trial granted.

All concur, except Rapallo, J., not voting, and Danforth, J., not sitting.

Judgment reversed.



**Declarations of Servants after Accident not Admissible in Evidence.**—In case of an accident upon a railroad train, declarations of servants of the company after the occurrence explanatory as to it or otherwise are not admissible in evidence. *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; *Giles v. Western R. R. Co.*, 8 Metc. (Mass.) 44; *Lafayette & Ind. R. Co. v. Ehman*, 30 Ind. 83; *Anderson v. Rome, etc., R. Co.*, 54 N. Y. 334; *Milwaukee & Miss. R. Co. v. Finney*, 10 Wisc. 388; *Luby v. Hudson River R. Co.*, 17 N. Y. 181; *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265; *Michigan Central R. R. Co. v. Gougar*, 55 Ill. 503; *Bellefontaine, etc., R. R. Co. v. Hunter*, 33 Ind. 335; *Michigan Central R. R. Co. v. Coleman*, 28 Mich. 440; *Furst v. Second Ave. R. R. Co.*, 72 N. Y. 542; *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa, 526; *Newsom v. Georgia R. Co.*, 66 Ga. 57; *Travis v. Louisville & N. R. Co.*, 9 Lea (Tenn.) 231; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 62; *Newsom v. Georgia R. Co.*, 62 Ga. 339; *Baltimore & Ohio R. Co. v. Sulphur Spring I. S. Dist.*, 2 Am. & Eng. R. R. Cas. 167; *Barker v. Allegheny Valley R. Co.*, 8 Am. & Eng. R. R. Cas. 141; *Moore v. Chicago, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 401; *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 85; *Dietrich v. B. & H. S. R. Co.*, 11 Am. & Eng. R. R. Cas. 115; *Patterson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. R. Cas. 180; *Alabama Gt. Southern R. Co. v. Hawks*, 72 Ala. 112; s. c., 18 Am. & Eng. R. R. Cas. 194.

**Declarations of Servants Admissible when Part of Res Gestae.**—Under certain circumstances declarations of servants made contemporaneously with the accident or very shortly after it are held admissible as part of the *res gestae*. *Griffin v. Montgomery & West Point R. Co.*, 26 Ga. 111; *Wright*



**v. Georgia R. R. Co.**, 34 Ga. 330; **Atlanta & L. G. Co. v. Hodnett**, 29 O. 461; **Covington & L. R. Co. v. Ingles**, 15 B. Monr. 637; **Chicago, B. & Q. Co. v. Riddle**, 60 Ill. 534; **Whittaker v. Eighth Ave. R. Co.**, 5 Robt. (N. Y.) 650; **Hanover R. R. Co. v. Coyle**, 55 Pa. St. 396; **Brehm v. Great Western R. Co.**, 34 Barb. 256; **Verry v. Burlington, C. R. & M. R. R. Co.**, 47 Iowa, 50; **Houston & T. C. R. Co. v. Wylie**, 5 Am. & Eng. R. R. Cas. 541; **Pennsylvania Co. v. Rudel**, 6 Am. & Eng. R. R. Cas. 30; **Adams v. Hannibal & St. Jo R. Co.**, 7 Am. & Eng. R. R. Cas. 414; **McLeod v. Ginther's Adm'r**, 15 Am. & Eng. R. R. Cas. 291.

**Declarations of Parties Injured.**—Declarations of a person injured in a railroad accident as to the cause of the injury are ordinarily not admissible in evidence. **Reed v. New York Central R. Co.**, 45 N. Y. 574; **Illinois Central R. Co. v. Sutton**, 42 Ill. 438; **Newsom v. Georgia R. R. Co.**, 66 Ga. 60; **Matteson v. New York Central R. Co.**, 85 N. Y. 487.

But expressions of pain and suffering made use of by such persons to a physician examining them are admissible in evidence. **Matteson v. New York Central R. Co.**, 85 N. Y. 487; **Brown v. Hannibal & St. Jo R. Co.**, 66 Mo. 588; **Murphy v. New York Central R. Co.**, 66 Barb. 125; **Nichols v. Brooklyn City R. R. Co.** 30 Hun (N. Y.), 437; **Houston & T. C. R. Co. v. Schafer**, 15 Tex. 641; s. c., 6 Am. & Eng. R. R. Cas. 421.

Occasionally the declarations of a party injured in a railroad accident made about the time of the accident are admissible as part of the *res gestæ*. **Friedman v. Railroad Co.**, 7 Phil. 203; **Brownell v. Pacific R. Co.** 47 Mo. 240; **Perigo v. Chicago R. I. & P. R. Co.**, 55 Iowa, 326.

**Dying Declarations.**—The dying declarations of a party killed in a railroad accident are not admissible in evidence on the same ground as in homicide cases. **Brownell v. Pacific R. Co.** 47 Mo. 240; **Friedman v. Railroad Co.** 7 Phila. 203; **Marshall v. Chicago & St. E. R. Co.**, 48 Ill. 475; **Daly v. New York & N. H. R. Co.**, 32 Conn. 256; **Chicago & N. W. R. Co. v. Howard**, 18 Bradw. (Ill.) 569.

**Deaf Persons approaching Railroad Crossing.**—The reader is referred to the following cases which all contain remarks relative to the duty of deaf persons approaching or walking upon a railroad track: **Laicher v. New Orleans, etc., R. Co.**, 28 La. Ann. 320; **Coggswell v. Oregon & Cal. R. Co.** 417; **Waldele v. New York Central & H. R. R. Co.**, 19 Hun (N. Y.) 69; **Zimmerman v. Hannibal & St. Jo R. Co.**, 71 Mo. 476; s. c., 2 Am. & Eng. R. R. Cas. 191; **Louisville & N. R. Co. v. Cooper**, 6 Am. & Eng. R. R. Cas. 5; **Purl v. St. Louis, K. C. & N. R. Co.**, 6 Am. & Eng. R. R. Cas. 27; **Cleveland, etc., R. Co. v. Terry**, 8 Ohio St. 570; **Central R. Co. v. Feller**, 84 Ill. St. 226; **Morris, etc., R. Co. v. Haslan**, 88 N. J. L. 147; **New Jersey, etc., Transportation Co. v. West**, 82 N. J. L. 91; **Zimmerman v. Hannibal & St. Jo R. Co.**, 2 Am. & Eng. R. R. Cas. 191; **Chicago, etc., R. Co. v. Miller**, 6 Am. & Eng. R. R. Cas. 89; **Johnson's Adm'r, v. Louisville & N. R. Co.**, 18 Am. & Eng. R. R. Cas. 628.



BURNS

v.

NORTH CHICAGO ROLLING MILL CO.

*(Advance Case, Wisconsin. May 15, 1884.)*

In an action against a railroad company to recover damages for an injury at a crossing the jury in response to special questions replied that the plaintiff on approaching the crossing did not look up or down the track, that it was very dark, that the plaintiff was driving slowly and that the train which occasioned the injury was moving slowly. They found also that plaintiff was notified of the danger before he reached the track but paid no attention to the notice and that the notice was not given him in time to enable him to avoid the danger. They also answered in response to one question that plaintiff could have seen the lights of the engine in time to avoid danger had he been looking out for them, while in answer to another they replied that the plaintiff could not under the circumstances have seen the train approaching in time to avoid a collision. The general verdict was for plaintiff.

*Held*, that the special findings were so clearly inconsistent as to indicate a disposition on the part of the jury to distort the evidence in order to make a case favorable for plaintiff, and that a new trial would be ordered accordingly.

Instructions with regard to negligence and contributory negligence should be given to the jury in connection with questions submitted on those points and not as general instructions in the case.

APPEAL from circuit court, Milwaukee County.

Johnson, Rietbrock & Halsey for respondent, Michael A. Burns.

Finches, Lynde & Miller, for appellant, North Chicago Rolling Mill Co.

TAYLOR, J.—This action was brought to recover damages for an injury sustained by the plaintiff while crossing the track of a railroad owned and used by the defendant company at Bay View, near the city of Milwaukee. The accident occurred between 7 and 8 o'clock in the evening of the eighteenth of October, 1881, at a place where the company's railroad track crosses a public highway leading from Bay View to the city of Milwaukee. The plaintiff was driving an express wagon with one horse, and as he came on to the crossing a train of cars loaded with coal was backing down across the street. There were 12 or 13 dump cars, and the engine was pushing the cars ahead of it, so that the engine was about 150 feet from the plaintiff and his wagon, when he was struck by the coal car at the end of the train.

The jury found a special verdict, upon which the court directed a judgment for the plaintiff. The company appeals, and alleges for error—First, that the court erred in refusing to order a nonsuit on the ground that the evidence of the plaintiff showed con-

clusively that the plaintiff was guilty of negligence which directly contributed to the accident, and because the evidence failed to show any negligence on the part of the defendant; second, in refusing to give the tenth and eleventh instructions asked by the defendant; third, in giving improper instructions to the jury; fourth, in refusing to grant the motion to set aside the verdict and for a new trial.

After reading the whole evidence, as presented by the bill of exceptions, we have very grave doubts whether there is any negligence shown on the part of the railroad company which would justify a verdict against it, and at the same time we find considerable evidence tending to show negligence on the part of the plaintiff which contributed to the injury; but we are not prepared to say, as a matter of law, that there was such an entire want of evidence showing negligence on the part of the company, nor that there was such conclusive evidence of negligence on the part of the plaintiff as would justify the court in taking the case from the jury upon either of said issues. We cannot say, therefore, that the circuit judge erred in refusing to nonsuit the plaintiff upon either of the points urged by the appellant. Whether the exception taken to the refusal of the court to give the tenth and eleventh instructions asked, and the exceptions to the instructions given, were well taken or otherwise, we do not deem it necessary to determine. We deem it proper, however, to suggest that, when the jury are called upon to render a special verdict, the trial court may, in its discretion, limit its instruction to such matters as are necessarily involved in the questions of fact submitted to them.

Of the sixty-one questions which the jury were required to answer as their special verdict, there were but three to which the instructions asked and refused, or to which the instructions given and excepted to, could have any application. They are the thirty-sixth question, submitted at the request of the defendant, viz., "Do you find for the plaintiff or defendant?" and the ninth and tenth questions submitted by the plaintiff, viz., "Was the plaintiff guilty of negligence on his part which contributed to bring about the collision?" and, "Was the defendant guilty of negligence in running its train over said crossing without having any flagman at said crossing, and with only such preventions as were in fact taken to avoid collision?" All the instructions as to what constituted negligence on the part of the plaintiff as well as on the part of the defendant should have been given to the jury in connection with these questions, in order to aid them in giving a proper answer to each, and not as general instructions in the case.

This case is, we think, another instance of the abuse of the statute, which gives a party to an action the right to demand a special verdict from the jury. There were 61 questions submitted for them to answer, and it is not strange that the answers are somewhat inconsistent, indefinite, and contradictory. On account of these de-

facts in the answers to the questions submitted, and in view of the weakness of the evidence to sustain a verdict in favor of the plaintiff, we are of the opinion the court erred in refusing to set aside the verdict and grant a new trial.

To the eleventh question by defendant the jury say that "the plaintiff was notified, before he reached the track on which the cars were crossing, to look out, but not in time to avoid a collision." To the twelfth they say: "The plaintiff did not heed the notice to look out because he could not;" and to the twenty-second they say: "The plaintiff could, had he looked, have seen the lights of the brakeman or the lights on the locomotive at any time before he reached the track on which the collision occurred." To the sixth question of the plaintiff the jury say that "the crossing was so situated that the plaintiff, in the exercise of ordinary care, could not see the approaching train, as the light and weather were, in time to avoid the collision." These findings, when read in connection with others showing that the plaintiff did not look on either side of the track, north or south, before he reached the crossing; that the night was very dark; that the train was moving slowly,—about as fast as a man would walk; that the plaintiff was walking his horse before and at the time he entered upon the railroad track; and that his horse was gentle and easily managed,—do not seem consistent with each other. Under such circumstances it would seem that if the plaintiff was notified, before he reached the track, to look out for the train, and he had been in the exercise of ordinary care, he would have stopped without going upon the track; and the finding of the jury that he could not do so in time to avoid the collision, seems to us inconsistent with the finding that he was warned of the danger before he reached the track. The answer to the sixth finding is also inconsistent with the answer to the twenty-second question of the defendant. By the answer to the twenty-second question the jury say plaintiff could have seen the lights of the brakeman and on the locomotive at any time before he reached the track where the collision occurred, had he been looking for the same; and by their answer to the sixth question of the plaintiff, they say the crossing was so situated that the plaintiff could not see the approaching train, as the light and weather were, in time to avoid a collision. There is a clear inconsistency in these findings, and they tend to show at least a disposition on the part of the jury to distort the evidence in order to make a case favorable to the plaintiff. These findings are subject to the same objections as the findings in *Haas v. Railroad Co.*, 41 Wis. 44; *Kearney v. Railroad Co.*, 47 Wis. 144; *Lawton v. Ins. Co.*, 50 Wis. 163; and *Cottrill v. Railroad Co.*, 47 Wis. 634; and in this case, as in the cases cited, the verdict should have been set aside and a new trial ordered.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

PATTERSON

v.

DETROIT, L. AND N. R. Co.

*(Advance Case, Michigan. January 28, 1885.)*

Where a railroad company obstructs a street for more than five minutes, it will be liable, under How. St. of Michigan, § 3323, to a private party, who, by reason of such obstruction, sustains special damage.

In an action for damages caused by such an obstruction, expenses incurred by plaintiff by being detained until too late to take the train intended, may be recovered.

ERROR to Clinton.

O. W. Baker and H. J. Patterson for plaintiff.

M. V. & R. A. Montgomery for defendant.

CHAMPLIN, J.—Plaintiff impleaded the defendant before a justice of the peace for unlawfully obstructing a public highway in the township of Oneida, in the county of Eaton, by its freight cars, by which the plaintiff was hindered and delayed from passing along said highway to a grist-mill; and by reason of such obstruction he was hindered and prevented from taking a certain train, and from transacting certain business at Ionia, and other damages particularly alleged, but unnecessary to mention. The defendant pleaded the general issue, and the trial resulted in a judgment for plaintiff for \$13 damages. Defendant appealed to the circuit court, where the plaintiff recovered a judgment of \$2.50 damages. The defendant brings the case into this court by writ of error, and assigns error upon the refusal of the judge to charge as requested by defendant's counsel, and in instructing the jury "that upon the proofs plaintiff was entitled to recover two and one half dollars damages."

It appeared upon the trial that the plaintiff was travelling along the public highway leading into the village of Grand Ledge from the farm of plaintiff, with his hired servant and team. He had a load of flour which he was taking to the grist-mill at Grand Ledge. The road he was travelling ran north and south, and is crossed by the railroad of defendant, which at this point runs nearly east and west. As he approached the railroad track he observed that it was obstructed by a train of freight cars standing on the side track, which also ran across the highway. The train was not separated at the highway crossing or the cars removed, so as to permit the plaintiff to pass, but he was kept and detained there and prevented from crossing for the period of 25 minutes, by reason of the cars of defendant obstructing the highway. Evidence was given of the

damage suffered by reason of the detention, which was made up of loss of time of the man and team, and extra expense paid out by plaintiff and made necessary by reason of the detention. The defendant introduced no evidence whatever, but requested the court to charge the jury: (1) Upon the declaration and proofs the plaintiff is not entitled to recover. (2) The case made by the proofs varies materially from the one alleged in the declaration. (3) The measure of damages, if anything, cannot exceed the value of the time of the plaintiff's hired man and team for and during the 25 minutes during which they claim to have been detained. These requests were refused, and the court instructed the jury that, upon the proofs, plaintiff was entitled to recover two and one half dollars damages.

Under the first assignment of error the counsel for defendant claims that the statute, having prohibited a railroad company from obstructing a street for more than five minutes at any one time (How. St. § 3323, sub. 5), it is the duty of the defendant to avoid such obstruction if possible; but that such duty is a public duty, and not one for breach of which an individual may claim personal damages. The premises stated in the above proposition may be granted, but the conclusion drawn therefrom by the defendant's counsel does not at all follow. The duty to avoid obstructing a public highway, contrary to the statute, is one which defendant owes to the public, without doubt. But it has always been held that if, in the non-observance of public duties, a party causes an injury or damage to an individual of a special nature, differing in kind from that suffered by the public generally, he has a right of action to recover such damage. Such was the damage alleged, and for which plaintiff was allowed to recover in this case. The variation complained of in the second assignment of error consists in the averment in the declaration that the defendant obstructed a certain highway in the township of Oneida, when the proof was that the obstruction, if any, was of a street in the village of Grand Ledge. Counsel for the defendant, however, conceded on the trial that the village of Grand Ledge was in the township of Oneida. There was, therefore, no material variance between the allegation and the proof. There was no error in refusing the third request of defendant. The expenses incurred by plaintiff by being detained until too late to take the morning train was a direct result of the obstruction, and rendered necessary thereby. We discover no error in the record, and the judgment is affirmed, with costs.

The other justices concurred.

**General Reference.**—As to the subjects discussed in the principal case. See *Young v. Detroit, G. H. & M. R. Co.*, and note, *infra*.

YOUNG

v.

DETROIT, G. H. AND M. RY. CO.

*(Advance Case, Michigan. April 22, 1885.)*

As a railroad company has no right to obstruct a highway with its cars for a longer period than five minutes at any one time, a violation of its duty in this respect is negligence, and if a party is injured by reason thereof, being free from fault on his own part, the company will be liable therefor.

Where a party, in attempting to cross the track at a highway, is thrown out of his cutter and injured by reason of his horse becoming frightened by the proximity and position of cars that the railroad company has allowed to obstruct the highway for more than five minutes, and such party is free from negligence himself, the company will be held liable.

In an action to recover damages for such an injury, it is not error to refuse to instruct the jury "that the highway was not obstructed by the railroad company when a space of sixteen feet or more of the travelled portion was left for the passage of teams and vehicles," as the question whether such space would be sufficient or not would depend upon circumstances, and should be left to the jury to determine from the evidence in the case.

No material error appearing in the instructions or ruling of the trial court, judgment for plaintiff is affirmed.

ERROR to Oakland.

W. H. Russell and George Jerome for plaintiff.

W. N. Draper and F. A. Baker for defendant and appellant.

CHAMPLIN, J.—This action was brought to recover damages for injuries received by plaintiff while crossing defendant's tracks at Drayton Plains, on the ninth day of February, 1884. The defendant's road crosses the highway a few rods east from the depot, and at an angle somewhat less than 45 degrees. At this point there are two tracks: the main line, and a side track which lies north of the main line and about 10 feet therefrom. The highway crossing is planked, and is about 20 feet in width. At the time of the accident the side track was occupied by a west-bound freight train which was awaiting the arrival of the east-bound passenger express train, then nearly due. The freight train backed into the side track from the west, pushed some freight cars east of the crossing, and then cut the train at the crossing, leaving a freight car to the east and the caboose car to the west of the centre line of the highway. The distance between these cars was between 16 and 30 feet. The witnesses do not agree as to the exact distance. The northeast corner of the caboose was, by testimony of plaintiff's witnesses, over the westerly side of the plank crossing, a distance of about three feet, and the car on the east, which was an ordinary box car, stood close to the planking on that side.



On the morning of the ninth of February, 1884, the plaintiff, with her husband, was travelling east on the highway, with a horse and cutter. He was sitting upon the right-hand side and was driving the horse. Mr. Young, the plaintiff's husband, describes the accident as follows: "Those cars stood on the side track. In order to get between those two cars we had to turn and go square across, because the car on this side—well, on both sides—the corner of the first car stood out, and the corner of the other, the road being slanting. They stood out so that we were obliged to turn square across. After we had passed between those cars the horse sheered off a little to the further car, and the buggy ran onto the rail,—the cutter ran onto the rail and throwed the cutter over. It caught on the rail. It went onto the first rail and then went down onto the second one and caught the cutter. There was no plank between the rails there. In the travelled part of the highway it was planked between the rails. We couldn't get onto the plank when we first went on, the road being slanting. We could get the cutter onto the plank, but at the further end we couldn't get the cutter onto the plank—the whole of it; one runner run on the rail. I had the reins, one in each hand. I was driving with a tight rein. I was throwed out. As to guiding the horse with the reins, why I was holding the horse tight—holding the reins tight. I was trying to guide him across the track. I was not trying to drive him onto the rails,—I was trying to drive him over the crossing; but he sheered from the corner of the car. He sheered from the corner of the car to the right. I mean down this way [indicating]; that would carry us away from the plank portion of the main track. In trying to get onto the plank I was unable to do so, and was carried onto the rail. I was driving a very good horse. Yes, and a very quiet horse. He was a little nervous when he came to those cars. The cutter was tipped over, and I and my wife was thrown out. When I was there with my horse and cutter at that crossing, I looked at the bank on my left hand and thought I couldn't turn there; and I thought I rather run the risk of going through instead of turning around; so I run the risk of going through."

Several persons had crossed with the cars in the position they were in when plaintiff crossed, without difficulty and without accident. Mr. Earle drove a spirited and excitable horse and cutter across, immediately ahead of plaintiff. Edgar Chamberlain drove across with a horse and cutter, and he says that he saw teams ahead of him. They were crossing. One team was a two-horse cutter, not very close ahead of him; might have been six or eight rods. George W. Chapman, another witness produced by the plaintiff, drove across immediately after the accident in the opposite direction from that which plaintiff crossed. He says that he drove through right across the planking where plaintiff and her husband

came through, and kept on the plank all the way. The plaintiff was sworn, and testified as follows: "*Question.* Now, will you state how your husband drove the horse across there; whether he made any turn, and how the horse acted, and all about it? *Answer.* Well, of course he had to turn. The horse was a little nervous. I was watching the horse principally to see if we were going to get through all right. The cars seemed so near, so high up on each side of us, that the horse seemed a little nervous to go through, and went through a little faster, of course, than we started,—than we were going before we went through. We couldn't cross between the cars directly on this angling road; he run off a little to get around the first car. After he had run around he run out again a little to the further side—to the road—to get around onto the main travelled track. There was a car each side of the track. He reined in the first place to the left hand a little, first to get around the end of the car, and then turned in there. The horse sheered out—he was nervous—he sheered out to the right—that way; that would be away from the next crossing. My husband went to rein out that way, to get onto the plank at the next crossing; one runner struck the track and threw us out; struck the rail of the railway track."

The defendant, under its charter, had a right to construct and maintain its railroad across the public highway where this accident occurred. In doing so, it was its duty to so construct the railroad across the public highway as not to impede the passage or transportation of persons or property along such road (3 Terr. Laws, 1290); and in the discharge of this duty defendant had constructed a plank crossing in the direction of the highway of a width of about 20 feet. That this crossing was in good condition and was familiar to plaintiff and to her husband is conceded. It was also the duty of defendant in operating its road not to obstruct or impede the travel along the public highway by its cars or trains an unreasonable length of time. The statute has fixed what is a reasonable time in such case, and has limited it to a period not exceeding five minutes at one time. How. St. § 3323, subd. 5. At common law, whenever a right is conferred, and a corresponding duty imposed upon a person, he is answerable to another person who sustains damage by the negligent discharge of such duty. Negligence is nothing more than a failure to discharge the duty resting upon one under the circumstances of the case. *Mann v. Railroad Co.*, 55 Vt. 484.

It was the duty of the railroad company not to obstruct the travelled portion of the highway at the crossing by placing cars thereon and permitting them to remain an unreasonable time. If it did not discharge this duty, resting upon it in this respect, the defendant is liable to the plaintiff for damages arising from any injury which was the direct consequence of such negligence, unless

her own negligence contributed to produce such injury. The defendant requested the court to charge the jury that "the railway company had a legal right to occupy and use any portion of its side tracks within the limits of the highway for a train of cars which was awaiting the arrival of another train at a meeting point, as in this instance, so long as the travelled portion of the highway was left open and unobstructed; and under such circumstances the highway is not obstructed when a space of sixteen feet or more of the travelled portion is left open for the passage of teams and vehicles." This instruction the court refused to give as a whole, but did give all excepting these words: "And under the circumstances the highway is not obstructed when a space of sixteen feet or more of the travelled portion is left open for the passage of teams and vehicles."

Whether or not the travelled portion of the highway was obstructed, was a question of fact for the jury to determine under the evidence. The width of the opening would not in all cases be a just or safe criterion. It might be ample in one case and entirely insufficient in another, depending upon the manner in which one road crossed the other. In this case the public highway crossed the railroad at an angle less than 45 degrees, and in approaching the crossing from the direction in which the plaintiff was travelling, the cars were so near together, according to Mr. Young's testimony, that no passage-way could be seen along the travelled portion of the crossing; and in order to pass between the cars it was necessary to deviate from the travelled way and to cross the side track at nearly right angles thereto. And if it is true, as testified to by Mr. Young, that the position of the freight car was such that it drove him off the crossing, it cannot be said, as matter of law, that an opening between the cars of 16 feet or more in width of the travelled portion did not obstruct the highway.

But the defendant claims that the plaintiff was guilty of contributory negligence in attempting to cross, when, as claimed by plaintiff, the highway was obstructed; that the plaintiff and her husband were perfectly familiar with the crossing, and, seeing the situation of the cars, they must have known the danger; and that in such case it was plaintiff's duty to wait until the train had started or the obstruction been removed. The testimony is that plaintiff had waited more than 10 minutes, when, driving nearer, he saw the opening and attempted to drive through. The question of contributory negligence was fairly raised by this evidence, but it was not so plain and unquestionable as to conclusively preclude a recovery. It might or might not be negligence for plaintiff to make the attempt, depending upon the location of the cars, the distance they were apart, and whether, before he made the attempt to pass between them, the corner of the caboose car projected so far over the travelled portion of the plank crossing as to prevent

plaintiff's husband from seeing the danger and liability to accident. *Thomas v. Telegraph Co.*, 100 Mass. 156. The circuit judge, therefore, properly left the question to the jury in the portion of his charge which we quote, as follows: "Negligence in law consists in a want of that reasonable care which should be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. Contributory negligence is such want of care which contributes to the injury complained of. Did the plaintiff's husband use and exercise ordinary care in driving through the passage? Did he use ordinary care and caution in approaching the crossing and determining whether he could cross in safety? Did he use ordinary care after passing upon the crossing in driving and guiding his horse? If you find that he did not use due care, but was guilty of negligence, either in determining whether he could drive across or in driving his horse across with due care, if he contributed to the injury on account of his negligence, then the plaintiff could not recover."

The circuit judge further charged that the negligence of plaintiff's husband was her negligence, and that she could not recover if either she or her husband was guilty of any negligence which in any way contributed to the injury; and he instructed them "that in determining whether the plaintiff or her husband was guilty of negligence or want of ordinary care which caused or contributed to produce the injuries complained of, you may consider their age, their statement that they saw the witness Earle drive across said track at said point just ahead of them, the character of the horse they were driving for gentleness, together with all other facts and circumstances touching their conduct or the conduct of either of them upon the occasion in question." He also instructed them that "the question of defendant's negligence, and contributory negligence on the part of the plaintiff or her husband, are for the jury to determine from all the facts and circumstances of the case." The charges contained in the last two quotations were excepted to, and error is assigned upon them, and it is urged that even if the age of James Young could be considered at all in connection with the manner in which the horse was driven, certainly the age of the plaintiff, who had no part in the management of the horse, could not properly be taken into account. We see no weight to the objection. The plaintiff's age was proper to be shown in the case, and it was proven without objection. *Hassenmeyer v. Michigan Cent. R. Co.*, 48 Mich. 205; s. c., 6 Am. & Eng. R. R. Cas. 59. How much weight it had or was entitled to receive on the question of contributory negligence may be difficult to state. It showed, however, that the parties had arrived at years of discretion, and were called upon to exercise mature judgment in attempting to cross and in driving across the tracks, and it is not perceived how the testimony could in any event prejudice the defendant.

There was no such want of due care shown in the conduct of the plaintiff or her husband as would have justified the court in taking the case from the jury; and, unless there was, the verdict cannot be disturbed upon that ground. The fact that other parties had driven across with safety was not conclusive proof of negligence of plaintiff or her husband. That evidence was proper to go to the jury and tended to prove negligence. Whether it established it or not, was for the jury to determine under all the facts of the case. If it be conceded that teams could be driven through the opening left by defendant between its cars, and across the plank crossing, without coming in contact with the rail of the main track, yet, if the freight car obstructed the travelled track, and by reason of such obstruction caused the plaintiff's horse to sheer off so as to throw one runner of the cutter against the rail of the main track, the horse being one of ordinary gentleness, such conceded fact would present a proper question for the jury to determine whether the injury resulted from leaving the freight car in that position, and whether plaintiff's husband was in the exercise of ordinary care while driving the horse.

No railroad company has the right to obstruct a public highway with its cars an unreasonable length of time, and, as before stated, the legislature has enacted that this time shall not, in any one instance, exceed five minutes. The liability arises from the duty of the company to leave the travelled part of the highway unobstructed after the expiration of the reasonable time limited by law. A violation of this duty is negligence, and if a party is injured by reason thereof, being free from fault on his own part, wrong and injury concur, and the liability attaches. The testimony of the plaintiff tended to prove that both the freight and the caboose car were left in and obstructed the travelled portion of the highway. But the testimony of the defendant's witnesses tended to prove that the whole planked crossing was left free and unobstructed. The facts were submitted to the jury under proper instructions, and they must have come to a conclusion in accordance with the testimony of plaintiff's witnesses, and we must take the same view of the facts that the jury did. We can only apply the law to those facts. The shying of the horse was the result of the act of the defendant in obstructing the highway. If the car was lawfully there, and defendant had not violated any duty at the time, no liability would have attached, for the reason that, although injury might have arisen from the shying of the horse, the defendant had been guilty of no wrongful or negligent act which concurred in producing the injury.

And here is to be noted the distinction between this case and that of *Gilbert v. Flint & P. M. Ry. Co.*, 51 Mich. 488. It was said in that case that "the mere presence of the car in that portion of the highway, apart from its fitness or liability to produce



that consequence" (that is, to frighten a horse of ordinary gentleness), "is not counted on as matter of grievance. The right of action was rested on the assumption that the car there standing was a thing which would naturally scare usually gentle horses. It was therefore a vital question whether it was really a cause of that kind of danger or not; because, if it was not dangerous in that way, there was no foundation for the action." In this case, in one count of the declaration it is averred that the defendant, as the plaintiff approached the track from a northerly direction, placed upon its side track in said highway and street, and in the centre thereof, at said point of intersection, two cars, to wit, one a box or freight car, and one a caboose or way car, thereby wholly obstructing the passage over and upon said street and highway at said point of intersection, and then and there wrongfully, carelessly, and negligently permitted the same to remain so placed for a long space of time, to wit, for upwards of twenty minutes, and after such delay said defendant drew its cars apart to enable persons with vehicles to pass between them over and upon said street and highway and across its said tracks, and then and there wrongfully, carelessly, and negligently placed said cars, to wit, one box or freight car, and one a caboose or way car, upon either side of the centre of said highway, and of the planked and timbered portion thereof, and within the limits thereof, so as to leave a space of less than twenty-two feet between said cars and within said highway, and wrongfully, carelessly, and negligently permitted them to remain for a long space of time, to wit, ten minutes, and by such careless, wrongful, and negligent acts and conduct of said defendant on, etc., at, etc., the cutter drawn by said horse being driven by her husband, was thrown off from the plank placed between the rails of defendant's tracks at said place of intersection for the convenience and safety of persons passing over and upon said street at that point, was overturned, and said plaintiff, without carelessness or negligence on her part or on the part of her husband, was then and there thrown from said cutter with great force and violence, and received severe and permanent injuries, etc.

Another count is to the same effect, except that it avers that they left the space of less than twenty-two feet, and in such manner as to induce persons passing over said street and approaching the track from the north to erroneously believe that such passage could be made in safety; and it also avers that through the wrongful and negligent acts of defendant the cutter was thrown off from the planked or timbered portion of said highway between the rails of defendant's main track and upset, etc.

This statement of the declaration shows that the decision in *Gilbert v. Railway* does not apply to this case. At the commencement of the trial, before any testimony was given, counsel for defendant objected to the introduction of any testimony under



the declaration on the ground that it did not allege a sufficient cause of action. The court said: "The plaintiff may proceed and put in his proofs, and I will examine this question." The trial proceeded and both parties introduced their testimony, and no ruling was made by the judge upon the objection. Exception was duly taken, however, to the ruling in permitting the cause to proceed, and the defendant is entitled to the benefit of its exception to the same extent as if the objection had been overruled and exception taken by the defendant. A circuit judge, by taking an objection under advisement or by taking the testimony subject to an objection, cannot by omitting to rule upon it deprive the party of the benefit of an exception if the case goes adversely to him. In such case all objections taken are treated in practice as having been overruled and exceptions duly noted. But we think the objection to the declaration not well taken. Each count of the declaration discloses a good cause of action.

The seventeenth assignment of error is based upon that part of the charge of the court which reads as follows: "The plaintiff contends that the highway crosses the railway tracks at this point in an angling direction, and that the cars were so placed by the train-men of the freight train that teams had to pass or go over the crossing at right angles or square across, according to the testimony of some of the witnesses, which threw plaintiff so far to the right that she had to turn her horse sharply to the left to get upon the plank portion of the crossing, and in attempting to do so one runner of the cutter struck the inside rail of the main track, and the cutter was overturned." And it is claimed that the statement therein contained is not warranted by the testimony in the case; that it assumes that in passing the cars in question plaintiff's cutter was thrown off from the plank, and that an effort was being made to get it on again, and that the evidence did not warrant the statement that the cutter struck the inside rail of the main track and was there overturned; and defendant also claims that there is no testimony of any witness "that she had to turn her horse sharply to the left to get upon the plank portion of the crossing," and that no such inference can be fairly drawn from the evidence.

We have examined the record and find that Mr. Young, the plaintiff's husband, testified as follows: "I tried to get onto the plank on the further side; on this side [indicating]. Yes, I tried to get onto the plank on the east side; I mean I tried to get onto the east side of those planks,—onto the plank on the east side of the road; the car prevented me from getting onto those planks. I drove on the west end of the car. Here is the freight car standing; here the corner of it; here is the plank; and the horse sheered, and I wanted to get onto the plank to cross the road. . . . *Question.* Now, I ask you how near you drove to this corner? *Answer.* I drove as near to it as I could get to it. I mean

to say that I drove off from the ends of the plank near this freight car on my left,—one runner. I struck the rail after I passed the corner of the car. I struck the rail on the main track. I was past the cars, and I struck the rail on the main track. It was the main track. The position the cars stood in drove me off the crossing. . . . Q. Now, you say that you drove around to get around the corner of that car, and as a matter of fact you tipped over here, didn't you,—drove off from the end of these planks? A. Yes. We tipped over on the main track. I don't know whether it was the first or second rail of the main track for certain, but we fell on the rail of the main track, anyway. I was driving slowly; but the horse—I couldn't run her close to the car. I ran it within two or three feet of this car. My horse sheered away, and it brought us further from it; it brought us further to the west. The opening was not parallel with the highway; we had to go square across because the cars were opened that way. I was prevented from keeping on the planking on the main track because I could not turn in six feet. I don't know how much space there is between these two tracks. I haven't any idea. I know it isn't very far, but I don't know exactly the distance. I don't know whether it is ten feet. I should think it was six feet. I couldn't tell the distance between the tracks. You couldn't keep on the plank on this side. . . . I couldn't tell how far the freight car on the left stood upon the planked portion of the highway; I have no idea how far it stood on it. It stood far enough onto it that I couldn't get onto this side. The snow was on the ground; I couldn't tell whether I got off from the planking on the side track; I didn't notice it till I got further across; after I got over the side track had passed the cars. Between the tracks there was a space anywhere from six to nine feet. The horse sheered a little from the corner of the freight car; I told you that the corner of the freight car prevented me from turning my horse to the left. The horse sheered from the freight car. After passing the freight car I didn't turn my horse to the left and keep on the crossing, because you couldn't turn your horse in six feet and make him come right around onto the track again. Q. As a matter of fact, did you turn him at all? A. Yes; I tried to. It was necessary to turn him six feet. One runner of the cutter I tried to get on the plank. When I crossed the first rail of the main track only one runner was on the planking. I am sure about that, and one struck the rail. We had to turn and go right square across. We couldn't go the same way the road run. We had to turn and go right square across. The road was angling and the track was open right square across. I couldn't tell as to how much, if any, the freight car on the left stood over on the plank crossing. . . . This side of the crossing the planking slants off that way, and we had to go right square across this way, and that throwed the planking some

eight or ten feet further on the right hand side—on the west side. I had to go square across the side track. Driving square across the crossing on the west side would not bring us up west of the crossing on the main track. We could get one runner on the main track. We could get one runner on the planking and the other onto the rail. That is what throwed us over. If the cars had been away so that we could have gone across square with the turnpike, we could have kept on the planking all the way; but they wasn't."

Joseph S. Spencer testified that "when Mr. and Mrs. Young crossed there he drove up and drove square between the cars, because he had to, in order to get in there. In order to get onto the plank part of the next crossing he had to make back to left again. I saw that he had a rein in each hand, and driving as well as he could, I thought. He was driving all right. He was driving with tight reins, and he had a rein in each hand. I was looking at him as he was driving through there. I was standing right at the back door. I was watching him. There was an accident occurred there. When he went through between these two cars he had to make back to the left again to get onto the planking between the main track, and he didn't quite make it, and the left runner run on the end of the planking, and the right one struck square against the rail and tipped him square over. He attempted to drive onto the planking."

It was shown by another witness that the distance between the main and side tracks was ten feet and two inches, and that an ordinary freight car projected twenty-two inches outside of the rails. This would leave eight feet and five inches between the freight car and the main track.

These extracts from the testimony show that the charge of the court was justified by the evidence, and that no error was committed by using the language complained of. Nor do we consider the language of the court embraced in the eighteenth assignment of error misleading. He stated the testimony correctly as to the different measurements, and if he made an error in stating the sum total, it could not operate to mislead the jury.

There is no force in the nineteenth assignment of error, and it is unnecessary to discuss it. The errors assigned from the second to the seventh, inclusive, relate to the rulings of the court in the admission of testimony. No error was committed in the rulings embraced in the second, fifth, sixth, and seventh assignments. The third and fourth demand attention. Joseph S. Spencer, a witness called by plaintiff, was a passenger on the caboose car. He had testified to the position of the cars, the opening between them, the plaintiff's care in driving through, and this question was asked him: "*Question.* Will you state whether—how much siding they had there at that time that they weren't using at all?" Coun-

sel for defendant objected to this question as incompetent and irrelevant. The court overruled the objection and the witness answered: "Why, I couldn't say exactly, but then there was quite considerable; I mean this side track that they were on with the cars." Plaintiff's counsel then asked the witness: "Was there any siding that they could have put these cars on—this same siding? Was there room enough for them to put these cars upon without occupying any part of the highway?" To which the same objection and ruling were made, and the witness answered: "There was." The counsel for the defendant contends that both of these questions were incompetent, irrelevant, and immaterial, and his argument in his brief is: (1) That the witness was not shown to have any knowledge of railway tracks, or the working of railway trains at stations, and was not competent to testify as to the condition of any side track, nor as to the safety or possibility of reaching another track at that time, while an express train was approaching on the main line, and then nearly or quite due; that the mere existence of a side track did not warrant the conclusion that it could be safely occupied. (2) The testimony was irrelevant and immaterial, because, if the company had a right to use the siding in question as it was used, then the inquiry as to the other tracks was useless, and had no bearing on the case. If it had not that right the lack of other or additional siding could not confer the right, nor relieve the defendant from its obligations to the public; that in either view of the case the testimony could only have been called out to prejudice the jury, and it should have been excluded.

With reference to the first branch of the argument, a reference to the questions and replies will show that no inquiry was made concerning any side track except the one occupied by the freight train. As to whether a side track is fully occupied by cars does not require the testimony of an expert. Any one endowed with the sense of sight, who is cognizant of the facts, is competent to testify in answer to the questions propounded to the witness Spencer. The existence of a side track at a station, which apparently is in condition for occupancy, does justify the inference that it can be safely occupied. And the inference becomes stronger when such side track is in actual use as a siding; and in the absence of any proof to the contrary warrants the conclusion that it can be safely occupied. Whether such testimony was relevant in this case is a question of more difficulty. If this were a case of negligence *per se*, as a violation of a duty enjoined by positive law, the testimony would have been unimportant; but as the negligence complained of consists in not doing what ought to have been done, under the circumstances of the case, it was proper to show all the circumstances of the case; and the condition and situation of the side-track, and the position of the cars thereon, and

whether it was fully occupied or not, were facts which it was proper to place before the jury, so that they could determine whether the occupancy of and obstruction to the highway, as claimed, was, under the circumstances, reasonable or not. It was not necessary for the plaintiff to make this proof in order to justify a recovery, if there was testimony without it in the case which satisfied the jury of defendant's negligence in the matters alleged in the declaration; still, there was a presumption in favor of defendant, which arises in every case of alleged negligence, that the defendant had performed its duty, and therefore that it would have made a wider opening at the crossing if it had the room to do so; and as the burden of proving negligence was upon the plaintiff, she had the right to rebut this presumption by the introduction of the testimony of the witness, and for this purpose the testimony was relevant.

The plaintiff, after testifying to her injury, and the nature and extent thereof, and how she was affected thereby, testified that she was then sixty-three years of age, and that prior to the time she was injured she had charge of the work in the house herself, and did it all herself. She was then asked by her counsel: "Last season did you have any threshers at your place?" and she replied: "Yes, sir; we had them." The counsel then asked her how many. This question was objected to as incompetent, and error is assigned upon the ruling of the court permitting the question to be asked. The evident object of the testimony was to place before the jury the physical condition and capability which plaintiff had to perform manual labor previous to the accident, and she was permitted to testify that there were fifteen men the first day, and that she did the work the first day alone, and the second day she had a woman to help her; that before the accident she always did the cooking at home herself, and that she was not able to do it since she was injured. The testimony was competent. It tended to show the effect of the injury upon her, and it was a statement of facts within her knowledge, and in no sense expert testimony, or requiring professional skill to delineate. Neither was it so remote in point of time as to be irrelevant to the point in issue; that is, the nature and extent of her injury. The assignments of error are each overruled, and a judgment of affirmance must be entered.

The other justices concurred.

**Private Party Suffering Special Injury from Obstruction of Street may bring Suit.**—A private party who suffers special injury from the obstruction of a highway by trains at a railroad crossing is entitled to recover damages. *Murray v. South Carolina R. Co.*, 10 Rich. L. 227; *Dalzell v. Indianapolis, etc., R. Co.*, 32 Ind. 45; *Park v. Chicago & S. W. R. Co.*, 43 Iowa, 636; *Illinois Central R. Co. v. White*, 18 Ill. 164; *Tenn. & Ala. R. Co. v. Adams*, 3 Head. (Tenn.) 596; *Patterson v. Detroit, L. & N. R. Co.*, *supra*; *Young v. Detroit, G. H. & M. R. Co.*, *supra*.

## STATE OF WEST VIRGINIA

v.

## CHESAPEAKE AND OHIO R. R. Co.

(24 *West Virginia Reports*, 809.)

In an indictment for obstructing a public road it is not necessary to allege, that the wrongful act was "knowingly and wilfully done." It will be sufficient to allege that the act was done unlawfully or without lawful authority. And if it allege that the act was done "knowingly and wilfully," these words "knowingly and wilfully" will be treated as surplusage.

The Chesapeake & Ohio Ry. Co. was indicted for obstructing a public road; and the obstruction was shown to have been caused by raising the track of the railway, at the point where it was crossed by the public road. It was competent and material evidence on behalf of the defendant to show, that at the time said road was obstructed, the said railroad at that point was in the possession of and was run by another railroad company.

On the trial of an indictment against the Chesapeake & Ohio Ry. Co. for obstructing a public road in a certain county it became and was material to ascertain whether there was any other than the defendants' railroad within the said county; it was error in the circuit court to state in the presence of the jury, that all the witnesses proved that there was but one railroad in the said county and that was the railroad of the defendant.

At the March term, 1883, of the circuit court of Cabell County the Chesapeake & Ohio Ry. Co. was indicted for obstructing a public road. The indictment was in the words and figures following:

"THE STATE OF WEST VIRGINIA, CABELL COUNTY, ss.:

"In the Circuit Court of said county.

"The grand jurors of the State of West Virginia in and for the body of the county of Cabell, and now attending the said court, upon their oaths present that the Chesapeake & Ohio Ry. Co. a corporation, on the 1st day of January, 1883, in the county aforesaid, unlawfully, and without lawful authority, did knowingly and wilfully obstruct, injure and destroy the public road called and known as Hull's road, at and near where the said road intersects the James River and Kanawha turnpike, below the city of Huntington, in said county, against the peace and dignity of the State."

The defendant demurred to the indictment, but the court overruled its demurrer. It then pleaded "not guilty," on which issue was joined. Upon the trial of the issue the jury found the defendant guilty. A motion was made by the defendant to set aside the verdict and award it a new trial, on the ground that the verdict was contrary to the law and the evidence, all of which was set out in the defendant's bill of exceptions, which motion the court also



overruled, to which the defendant excepted, as it had also done to certain rulings of the court during the trial, all of which appear in the defendant's bill of exceptions.

The court assessed the defendant's fine at fifty dollars, for which and the costs of the prosecution the court entered judgment against the defendant. To this judgment the defendant obtained a writ of error.

W. H. Hogeman for plaintiff in error.

Attorney-General Watts for the State.

WOODS, J.—Section 45 of chapter 14 of the Acts of the Legislature of 1881, under which the defendant was indicted, is an exact reprint of section 53 of chapter 194 of the Acts of 1872-3, and also of section 47 of chapter 43 of the Code of West Virginia, and describes four different offences, each of which is declared to be a misdemeanor: first, any person who shall kill a tree and leave it standing within fifty feet of a road; second, or who shall, without lawful authority, knowingly and wilfully break down and destroy, injure or obstruct any bridge, or any bench or log placed across a stream for the accommodation of travellers; third, or who shall destroy, injure, deface or alter, any guide-board, milestone or milepost; and fourth, or who shall obstruct or injure any road, or ditch, made for the purpose of draining a road.

Here are four different offences, in only one of which the act is required to be done "knowingly and wilfully," in order to complete the offence. The public is at all times entitled to the free and unobstructed use of the public road, and whoever without lawful authority places any obstruction therein which deprives the public of this right violates this statute, whether the wrongful act was done ignorantly or knowingly, accidentally or wilfully. It was, therefore, unnecessary to allege in the indictment, that the wrongful act of the defendant was committed "knowingly and wilfully." It would have been sufficient to allege that the act was done unlawfully, or without lawful authority. The words "knowingly and wilfully" used in the indictment may be treated as surplusage, and then the offence will be described substantially in the words of the statute. We are of opinion that the court did not err in overruling the defendant's demurrer to the indictment.

This construction of the statute renders it unnecessary, in this case, to consider or decide whether a corporation can be guilty of an offence, where the unlawful act is required to be "knowingly and wilfully" done. But inasmuch as the law is now well settled, that a corporation is liable in civil proceedings for injuries knowingly and wilfully committed by its servants acting under its authority, and is indictable for acts of misfeasance, as well as for non-feasance, we apprehend that when a proper case arises, there will be but little difficulty in applying to it, in criminal cases, for wrong-

ful acts knowingly and wilfully committed in plain violation of law, the same rule as in civil cases.

Before the defendant could be convicted it was incumbent on the State to establish by competent evidence that "Hull's lane road" mentioned in the indictment was, at the time the same was alleged to have been obstructed, a public road; that the same had been obstructed within one year next before the finding of the indictment; and that it had been so obstructed by the defendant. Failing to prove either of these facts, the defendant was entitled to an acquittal. It follows, therefore, that the defendant had the right to introduce any competent evidence, to show that neither of these facts was true. It had the right to deny and disprove any or all of them. That it had the right to prove that "Hull's lane road" was a private and not a public road; that this road had not been so obstructed; and that the defendant had not obstructed said road—are propositions too plain for argument. Now it is not easy to perceive any better way for the defendant to prove that it did not obstruct the road, than to prove that some other person had done so. The evidence on behalf of the State set out in the bill of exceptions shows, that the Hull lane road, where it crossed the railroad line west of Huntington in Cabell County, had at one time been in tolerably good condition, but that in March of this (1883) year the employees of the railroad running west from Huntington had raised the track of the railway about seven inches higher than it formerly was, and had made it almost impossible to cross the railway with a wagon on the Hull road, and that the ascent to the railway and the descent from it was too steep to cross it hauling sawlogs, as the log would hang on the track in crossing it and made it dangerous in crossing, and that the embankment made by the company was seven or eight feet high at the place where the Hull road crosses the railway. On cross-examination of one of the State's witnesses, the defendant's counsel asked him, "who he meant by they, or the company," to which he replied, that "he supposed it was the Chesapeake & Ohio Ry. but he did not know of his own knowledge." The defendant's counsel then asked the witness, "If the Elizabethtown, Lexington & Big Sandy R. R. did not run the line of railway from Huntington to the Big Sandy River?" The defendant's counsel also asked another witness for the State on his cross-examination the following question: "Is not the line of railroad extending from Huntington westward to the Big Sandy River in the possession of the Elizabethtown, Lexington and Big Sandy R. R. Co., and was it not in the possession of, and run by said last-named company at the time said obstruction was placed in Hull lane road in March?"

The court refused to permit the said witnesses to answer either of these questions, and this forms one of the grounds of the defendant's bill of exceptions. The court then against the protest of the

defendant's counsel asked one of the same witnesses the following questions: "Do you know of any other railroad in Cabell County except the Chesapeake & Ohio Ry?" to which the witness answered, "No." "Has Hull's lane road been worked and used as a public road?" to which the witness answered, "Yes." To both of these questions and answers the defendant by its counsel again excepted. No other mention was made by any of the witnesses of the Chesapeake & Ohio Ry. Co., whereupon the court stated in the presence of the jury, "that all the witnesses proved that there was but one railroad running through the county, and that, the Chesapeake & Ohio R. R." To this remark of the court the defendant again excepted. This statement made by the court in the presence of the jury was well calculated to convince the jurors that the defendant was guilty, for if it was true that there was no other railroad in the county except the defendant's railroad, and as the court had prevented the defendant from proving that any other railroad company had possession of the defendant's railroad, there was no escape from the conclusion, that in the mind of the court, at least, the defendant was the party which obstructed the road. Such a statement was unwarranted by the evidence in the record, unless we assume that the confessed ignorance of a witness, as to a material fact, is equivalent to knowledge of the same fact, for the witness only stated that "he supposed the Chesapeake & Ohio Ry. did it, but he didn't know of his own knowledge," and that he did not know of any other railroad in Cabell County except the Chesapeake & Ohio Ry." The statement indicated to the jury the opinion of the court as to the weight of the evidence, and was therefore on well-settled principles unauthorized, for which if there was no other error this Court would reverse the judgment of the circuit court. *State v. Hurst*, 11 W. Va. We are at a loss to understand upon what principle or rule of law the court refused to permit the witnesses to answer the questions propounded by the defendant's counsel tending to elicit the fact that at the time the alleged obstruction was placed in Hull's lane road, in the line of railroad running west of Huntington, that portion of railroad line in Cabell County extending westward from Huntington to the Big Sandy River was in the actual possession and use of another railroad company. If the defendant had made it appear that that portion of said railroad line, at the time and place when and where the obstruction was placed, was in the actual and exclusive use of the Elizabethtown, Lexington & Big Sandy R. R. Co., it would tend to show that the road was obstructed by that company, and not by the defendant. This was a fact material for the defence of the defendant, and the evidence sought to be elicited by the defendant's questions was competent and material in support of that fact, and ought not to have been excluded. We

are further of opinion that the circuit court erred in refusing to permit the witness to answer the defendant's said questions.

As this case must be reversed for these errors it will be unnecessary to determine whether the court erred in the form of the question propounded by it to ascertain whether Hull's lane road was a public road, as it is not probable the question on a new trial will be propounded in the same form, for if the form of the question was objectionable the objection can be easily obviated by inquiry whether the road had been worked, and if so, in what manner and by whom worked.

For the reasons before stated the judgment of the circuit court of Cabell County must be reversed, the verdict set aside, and a new trial awarded to the defendant.

Reversed. Remanded.

**Indictments for Obstructing Highways.**—An indictment will lie against a railroad corporation for obstructing a public highway. Such obstruction constitutes a public nuisance. *Commonwealth v. Old Colony & Fall River R. Co.*, 14 Gray, 98; *Commonwealth v. Nashua & Lowell R. Corp.*, 2 Gray, 54; *Commonwealth v. Boston & Lowell R. R. Co.*, 12 Cush. 254; *Pittsburgh, Va. & C. R. Co. v. Commonwealth*, 10 Am. & Eng. R. R. Cas. 821; *Commonwealth v. New York, N. H. & H. R. Co.*, 112 Mass. 412; *Northern Central R. Co. v. Commonwealth*, 90 Pa. St. 800; s. c., 5 Am. & Eng. R. R. Cas. 818; *State of New Jersey v. Morris & Essex R. Co.*, 3 Zab. 360; *Louisville & N. R. Co. v. State*, 3 Head. (Tenn.) 528; *State v. Vermont Central R. Co.*, 80 Vt. 108; *Paducah, etc., R. Co. v. Commonwealth*, 10 Am. & Eng. R. R. Cas. 818; *Cincinnati Southern R. Co. v. Commonwealth*, 7 Am. & Eng. R. R. Cas. 91; But see, *contra*, *State v. Presd't. & Directors of the Ohio & Miss. R. Co.*, 28 Ind. 362.

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JACKSON

v.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RY.

(18 *Lea's Reports (Tenn.)*, 491.)

Damages sustained in driving a cart across the track of a railroad at a dangerous place, by the driver being thrown from the cart by its toppling motion, are not the proximate result of an obstruction by the railroad company of the public crossing by a standing train of cars, for which an action will lie against the company.

APPEAL in error from the Criminal Court of Marion County.

W. C. Donaldson for Jackson.

Foster V. Brown and W. D. Spears for Railroad Company.

COOPER, J.—The circuit judge sustained a demurrer to the declaration in this case, and the Referees report that his judgment should be reversed. The defendant excepts.

19 A. & E. R. Cas.—28

The action is brought to recover damages for injuries to the plaintiff's husband resulting in his death. The declaration avers that the defendant's branch road passes through the town of Victoria, in Marion County, having a depot on its south side for the accommodation of passengers and the receipt of their baggage and freight; that the business part of the town and the residence of plaintiff's husband were on the north side of the railroad; that there was only one public crossing or way over the railroad for reaching the depot from the north side, which was made and provided by the defendant for the public to travel on and over; that on the evening before the injury to the plaintiff's husband resulting in his death, the defendant left a train of cars standing on their track across the way aforesaid, and, although notified that evening by the deceased that he wished to cross the road the next morning, failed to remove the same; that on the next morning the plaintiff's husband drove his cart, in which was the trunk of a traveller intending to take passage on the defendant's train that morning, along the public way across the railroad, to carry the trunk to the depot; that by reason of the obstruction of the way by the defendant's standing train plaintiff's husband was compelled, in order to reach the depot with his cart, to cross the railroad track where no crossing was made or provided by the company, and where the track was about twelve inches high from the ground to the top of the rail, and while so crossing he was, by the jostling and toppling of the cart, thrown under the wheels of the cart, receiving injuries from the effect of which he died.

The question raised by the defendant's demurrer to the declaration is whether the obstruction by the defendant of the cross-way, which is charged to have been "wilfully, carelessly, wrongfully, unlawfully, and negligently" done, was the proximate cause of the injury to the plaintiff's husband so as to render the defendant liable therefor in damages. The right of the public to the highway crossing for the purpose of travel is so far paramount to the right and convenience of the company for any other purpose than that of transit by its running trains that the obstruction as stated in the declaration was clearly negligent and unlawful. *State v. Morris, etc., R. R. Co.*, 25 N. J. L. 437. The defendant was therefore liable in damages to any person having a right to cross its road at that point who was prevented from so doing by the obstruction. And the only question is whether the injury sued for was so far a proximate result of the obstruction as to render the defendant liable therefor because of the obstruction. The declaration does not aver or state any fact of negligence or wrong on the part of the defendant connecting it with the injury except the creation of the obstruction to the public way by the standing train of cars.

A long series of judicial decisions has defined proximate, or im-



mediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and might therefore have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not be reasonably anticipated, and over which the negligent party has no control. 2 Thomp. Neg. 1083, citing the authorities. A proximate cause is therefore a probable cause, and a remote cause an improbable cause. A wrong-doer, in other words, is answerable for all the ordinary and natural consequences of his wrong, but no further. The difficulty is in applying the general rule to the facts of a particular case.

It is very clear that a railroad company would not be liable for an injury to a person who undertook to drive a cart across its track at any other place than a regular crossing, and was thrown from the cart by its jolting over the rails. The track is the property of the railroad company, not intended to be crossed by other vehicles except at the ways provided for the purpose, and a third person who undertook to pass it elsewhere would be a mere trespasser. Such a person would act at his peril, the company being in no way responsible for any accident resulting from the attempt. The only possible ground to take this case out of the general rule is that the wrongful obstruction of the highway justified the plaintiff's husband in adopting an unlawful and dangerous route to reach the depot, and made the defendant liable for the consequences. And this is the position assumed by counsel, the argument being that the traveller has a right to reach his destination, and adopt the best mode that seems open to him, the question whether he was justified in so doing being one for the jury. But it is difficult to see how because one party has done an unlawful act, the other party can be justified in doing an equally unlawful act at the risk of the former. And the authorities are all in conflict with the contention. It seems to be well settled that if a traveller is compelled to leave the highway by reason of a defect therein rendering it impassable, and while so off the highway, and attempting with due care to pass the obstacle, receives an injury, he cannot recover damages of the town, although he could have done so if the injury had happened to him on the highway; for the negligence of the town is to be deemed a remote cause of the injury. 2 Thomp. Neg. 1092. It was so held when the traveller, going off the highway to shun an obstruction not otherwise passable, foundered in a pond. *Tisdale v. Norton*, 8 Metc. 388. And when, a bridge having been washed away and not rebuilt, the traveller attempted to cross at a ford not in the dedicated highway, the river being swollen. *Hyde v. Jamaica*, 27 Vt. 443, 458. The mere fact that a bridge is impassable will not justify a traveller in attempting to ford the stream under circumstances of danger. Damages accruing from this source are not the proximate consequences of a failure to keep



the bridge in repair. *Day v. Crossman*, 1 Hun, 570; s. c., 4 N. Y., 122; *Jackson v. Greene County*, 76 N. C. 282; *Farnum v. Concord*, 2 N. H. 392.

The exception to the report of the Referees will be allowed, and the judgment of the circuit court, sustaining the demurrer to the declaration, affirmed.

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GRAVES

v.

NORTHERN PACIFIC RY. CO.

(*Advance Case, Montana. January 7, 1885.*)

In the act of the legislature of Montana entitled "An act to provide for the payment of stock killed or injured by railroads," the clause, "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of and the injury to such stock," prevents the railroad company from exercising its rights of appeal from the findings of the appraisers, thus depriving it of the right of trial by jury. Such a provision is in conflict with the constitution of the United States and therefore invalid.

APPEAL from Third District, Meagher County.

Sanders & Cullen for appellant.

George F. Cowan for respondent.

GALBRAITH, J.—This action was originally brought in the justice court of Meagher County. The pleadings were as follows, viz.:

The complaint, after alleging, in substance, that the appellant is now, and was at the time of the injury complained of, a corporation organized under the laws of the United States, and the owner of a certain railroad running through the Territory of Montana and a portion of Meagher County, in said Territory; and that the respondent was the owner of a certain mare of the value of \$160, running in an inclosure adjoining the track and ground occupied by the railroad of the appellant in the county of Meagher; and that on or about the seventh day of October, 1883, without the fault or neglect of the respondent, the said mare strayed upon the ground occupied by the railroad of the appellant; and that the appellant, at the time and place above stated, so carelessly and negligently run its locomotives and cars that the same ran over the mare and killed her, to the damage of the respondent in the sum of \$160,—contains the following averment:

"That heretofore, to wit, on the twelfth day of October, 1883, at the said county of Meagher, and before the bringing of this action, under and by virtue of an act passed by the legislature of the

Territory of Montana, approved February 23, 1881, entitled 'An act to provide for the payment of stock killed or injured by railroads,' and an act amendatory thereto, approved March 2, 1883, this plaintiff having made and filed the necessary affidavits, and having duly served notice upon said defendant, and the necessary appraisers having been appointed to appraise the value of said mare, which valuation was duly assessed and returned by said appraisers to said defendant, fixing the value of said mare at the said sum of one hundred and sixty dollars, has complied with the provisions of the aforesaid act and the amendment thereto; that since the due return of the aforesaid appraisers more than thirty days have elapsed before the bringing of this action, and the said defendant has not paid the said sum of one hundred and sixty dollars, or any part or portion thereof."

The answer was in substance as follows:

It "denies that the respondent was the owner of the mare, or that she was of any greater value than eighty dollars; or that it was through the negligence of the appellant that she was killed, or that she strayed upon the railroad without the fault of the respondent. It affirmatively alleges that the animal was killed through the fault and negligence of the respondent, in permitting it to depasture in a field through which the appellant's road runs, which was not fenced so as to prevent it from straying upon the track, and that it was while the appellant was carefully operating its road, and running locomotives and cars thereon, as it might lawfully do, that the animal strayed upon the track of the appellant, and in consequence thereof, and without the fault or negligence of appellant, was accidentally run over and killed."

The replication denied that the animal was killed through any negligence of the respondent. It admits that the inclosure was not fenced at the railroad, and that the animal strayed from such inclosure upon the track. It avers that said mare was rightfully pastured there, and strayed upon the track without any fault, omission, or neglect of the respondent, and was killed and destroyed through the want of care and negligence of said defendant . . . in the operating and management of its said locomotive and cars, and that she was of the full value of \$160, as alleged in the complaint.

Judgment was rendered in the justice court against the appellant and in favor of the respondent for the sum claimed in the complaint, and the costs of suit. From that judgment there was an appeal to the district court, which, upon motion of the respondent for judgment on the pleadings for the sum claimed in the complaint, rendered judgment for said sum, with costs. From this judgment there is this appeal.

The questions presented relate to the validity of the act of the legislature mentioned in the complaint. The provisions of this law, necessary to be stated, are as follows: The first section of this

act makes railroad companies, operating any railroad in the Territory, liable for damages for damaging or killing any domestic animal by running its engines or cars over or against said animal. The second section was amended so as to read as follows:

"If the owners of the animal or animals so killed, or his or her authorized agent, shall make affidavit before some officer, authorized to administer oaths, that he or she was the owner, or authorized agent of the owner, of the recorded brand found upon the animal or animals so damaged or killed, at the time of such killing or damaging, and such person shall, within six months after such killing or damaging, deliver such affidavit to the agent, or an officer of such company or corporation, or shall make affidavit that the animal damaged or killed as aforesaid had no recorded mark or brand, and that he or she is the owner of such animal, describing it; and the corporation or company shall pay to such person delivering such affidavit, or such affidavit last as aforesaid, as follows:

SCHEDULE.

Yearlings, . . . . .	Each, \$23 00
Two years old, . . . . .	" 27 00
Cows, three years old and over, . . . . .	" 30 00
Steers (unbroken), three years old and over, . . . . .	" 45 00
Steers (work cattle), . . . . .	" 50 00
Sheep, . . . . .	" 3 00

"Milch-cows, thoroughbred and graded cattle and sheep, shall be paid for at their cash value: provided, that no railroad company shall, at any time, be required to pay more than the market value of any animal killed or damaged. Horses, mules, and asses shall be paid for at their cash value. In all cases where such railroad company or corporation shall kill any of the stock mentioned in this act, and for which no price or sum is fixed, the owner or agent of such stock shall, after the filing of such affidavit of ownership as aforesaid, select some disinterested freeholder of the county where such killing took place, and shall notify such company or corporation of said selection; and such company or corporation shall, within three days thereafter, select some suitable person to act with the person so selected, and the two so selected shall select a third, and the three so selected shall, without delay, proceed to appraise the value of the stock so killed, a majority of which three appraisers shall be sufficient to determine the same, and shall certify, under oath, such appraisement to an agent of such company or corporation. In case such railroad company or corporation shall refuse or neglect to appoint such appraiser, it shall be the duty of the justice of the peace nearest to the place in the county where the stock is so killed to select one disinterested person as appraiser, and to administer to him an oath to honestly appraise the value of such stock, which appraiser shall, without delay, proceed to act in

conjunction with the person selected by the owner, and they shall at once proceed as hereinbefore provided for them as appraisers; and such railroad or corporation shall, within thirty days after the receipt of certificate, pay to the owners of such stock so killed, or his or her agent, the amount of such appraisement, together with all the costs, as aforesaid; and in all cases where the value of such stock is established by this act, such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit of ownership of stock, as hereinbefore provided; and if said company or corporation shall fail to pay for said stock within the time as hereinbefore provided, the owner of such stock may commence proceedings in any court of competent jurisdiction for the amount found to be due and owing for such injured or killed stock; and the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of and the injury to such stock; and the court shall add and tax as costs in the action the costs of the proceedings upon the appraisement hereinbefore specified."

It will be observed that the animal alleged to be killed in this case did not belong to any of the classes set forth in the above schedule. Also, that the pleadings show that before the commencement of the action the respondent had complied with the provisions of the above law relative to the appointment of appraisers, and that said appraisers had assessed the value of the animal alleged to be killed, and fixed the value thereof at \$160. The section of the law under which the appraisers were appointed, provides that "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of and the injury to such stock." The court, in rendering judgment upon the pleadings, must have done so in pursuance of this law, for the value of the animal alleged in the complaint was denied in the answer. This law prevents the railroad company from exercising its right of appeal from the findings of the appraisers, thus depriving it of the right of trial by jury. This provision of the law in relation to the appointment of appraisers is not in accordance with the constitution and laws of the United States, and is therefore invalid. Their act, therefore, in fixing the value of the animal killed was unauthorized. That the law is invalid in this respect is virtually admitted in the argument for the respondent. This is sufficient for the disposal of this case, and renders unnecessary the consideration of the other question presented, viz., "the making of railroad companies liable for stock they may kill, irrespective of negligence."

The judgment is reversed, with costs, and the cause remanded for a new trial.

**LITTLE ROCK AND FORT SMITH RY. CO.**

*v.*

**HENSON.**

(89 *Arkansas Reports*, 413.)

When stock is killed or injured by being run over by a railroad train or engine, the statutory presumption is that the injury results from the want of due care and skill or diligence on the part of the company's agents or employees; but this presumption may be rebutted by proof that the company did exercise due care and skill or diligence to prevent the injury. A railroad company owes no duty to the owner of stock which strays upon its track, except to use ordinary or reasonable care at the time, to avoid injuring them.

The Circuit Court has no power to determine the facts of a case and direct the verdict for either party, even though if returned for the opposite party it would set it aside as against evidence. The only remedy in such cases is to promptly set aside verdicts that are unwarranted by evidence.

**APPEAL** from Pope Circuit Court.  
Clark & Williams for appellant.

**SMITH, J.**—This was an action against a railway company for damage to live-stock by the negligent operation of one of its trains. The plaintiff's witness proved the killing and wounding of the animals, but not the circumstances thereof.

Under the act of February 3, 1875, this made a *prima facie* case that the injuries were caused by the train and devolved upon the company the burden of showing affirmatively that reasonable care had been exercised. *L. R. & Ft. S. Ry. v. Payne*, 33 Ark. 816; *M. & L. R. R. Co. v. Jones*, 36 Ib. 87; *St. L., I. M. & S. Ry. Co. v. Vincent*, 36 Ib. 451.

The company, to rebut the presumption of negligence, proved that the accident happened on a dark and foggy night, when it was impossible to distinguish stock except at a very short distance from the engine. The train, composed of nineteen heavily freighted cars with a caboose and coach, was proceeding on its way down a descending grade at its regular speed of fourteen to seventeen miles an hour. The locomotive was furnished with a bright headlight and all hands were, as it seems, at their posts and on the alert. The stock appeared on the side of the track, about thirty feet from the engine. The engineer instantly whistled down brakes, reversed his engine, giving it steam, and sanded the track. The brakemen sprang to the brakes and screwed them down. But such was the momentum acquired by the train, on the down grade, that it was found impossible to stop it before it had struck the horses, whose escape was prevented by a culvert. The engineer and conductor

both testified that everything that was possible was done to avert the accident after the stock were discovered near the track, and that no human power could have stopped the train sooner.

This being all the evidence, the plaintiff asked the court to give the following instructions to the jury:

1. If the jury find from the evidence that the plaintiff was the owner of the stock mentioned in the complaint, and that it was killed or injured by the defendant company by being run over or against by defendant's engine or cars, the presumption is that the killing or wounding resulted from the want of due care and skill, or diligence, on the part of the defendant's agents or employees; but this presumption may be rebutted by proof that the defendant did exercise due care and skill, or diligence, to prevent the killing and injury.

2. If the jury find from the evidence that the plaintiff was the owner of the stock mentioned in the complaint, and that a part of said stock was killed and a part of it was wounded by the negligence or carelessness of the agents and employees of the defendant company, or that such injury resulted from a failure on the part of defendant's agents or employees to exercise due care and diligence, they will find for the plaintiff and assess his damages at whatever sum he may have actually sustained, as shown by the proof, not exceeding the sum of \$155.

3. The distance the train was run after the stock was discovered on the track, before it stopped, is immaterial; only it is a circumstance to be considered in connection with all the other proof, in the sense whether proper exertion, care, and diligence were used to stop the same, and it was the duty of the engineer and trainmen to be at their proper stations and to check the train and avoid the injury, if it could have been done by the exercise of due care and skill, or diligence, on the part of defendant's agents or employees, or some of those in charge of the train; but if the injury could not have been avoided by due care and skill, or diligence, by the trainmen, after the stock was discovered, the jury will find for the defendant.

To these instructions the defendant objected, because there was no evidence on which to base them, and because they were abstract and misleading. The objections were overruled and the instructions were given.

The court then gave the second of the following instructions for the defendant, and refused the first, to wit:

1. The issue to be tried in this case is not whether the train was or could be stopped within any given distance, but whether the company's agents, upon and in control of the train, made such efforts, resorted to such means, and exercised such care and skill to stop the train and avoid the injury, as the law requires. And the law does not require superhuman foresight or wisdom, but only



such efforts to be put forth in good faith, and such care and caution and skill as is ordinarily exercised by prudent men in the management of their own concerns. If the agents did this, and yet failed to stop the train and avoid the injury, then the injury was an unavoidable accident, and the company is no more liable by reason of their failure to avoid the injury than it would be if they had succeeded. And the court is of the opinion that the evidence in this case completely and conclusively shows that the company's agents did make every possible effort to stop the train within their power, and did resort to every means available to them, under the circumstances, to avoid the injury. That they did so use every precaution, care, and skill which was possible or practicable the evidence seems to leave no uncertainty or doubt and is in no manner conflicting. The court therefore directs the jury to bring in a verdict for the defendant.

2. That the issue in this case is not whether the train could be stopped within any given distance, but whether the company's agents on and in control of the train, made such efforts, resorted to such means, and exercised such care and skill to stop the train and avoid the injury as the law requires; and if they did, with honest purpose, make such efforts, and do all they could to avoid the injury, then the company is no more liable, because they failed to succeed, than they would if they had succeeded. And the law does not require superhuman foresight or wisdom, but only such care, prudence, and foresight as men of ordinary prudence use in the management of their own concerns. If the jury, therefore, find from the evidence that the company's agents on the train did make all such reasonable efforts to stop the train and avoid the injury, then the injury was an unavoidable accident, and the jury will find for defendant.

The jury found for the plaintiff, and assessed his damages at \$155.

The court overruled a motion for a new trial, which contained the following causes:

1. Because the verdict is contrary to evidence.
2. Because the verdict is contrary to law and instructions of the court.
3. Because the court erred in giving the first and second instructions prayed for by the plaintiff.
4. Because the court erred in refusing to give to the jury the first instruction prayed for by defendant.

We approve the charge of the court and its refusal to charge as requested by the defendant. No doubt it is a defect in our judicial system that the trial court is unable to direct a verdict for either party, where, if returned for the opposite party, it should be set aside as against the evidence. Such a practice saves time, trouble, and expense, besides conducing to a uniform administra-

tion of the law. And this practice was, to some extent, recognized and commended in *Martin v. Webb*, 5 Ark. 72, and *Hill v. Rucker*, 14 Ib. 706. But every such exercise of power involves the determination of a fact or facts. Thus in this case a direction to find for the defendant would have withdrawn from the consideration of the jury the question whether the company had used due care in the running of its trains. This was a question of fact, and our Constitution forbids judges to charge juries with regard to matters of fact.

The only remedy is for Circuit Courts to set aside promptly verdicts that are unwarranted by evidence. And this is what should have been done in the present case. The verdict is contrary both to the evidence and instructions of the court. The accident was apparently unavoidable. A railroad company owes no duty to the owner of stock which has strayed upon its track, except to use ordinary or reasonable care at the time to avoid injury to it.

Reversed and remanded for a new trial.

**Presumption of Negligence.**—As to whether there is or is not a presumption of negligence when cattle are injured by a railroad train, see *Wilson v. Norfolk & Southern Railroad Co.*, and note, *infra*.

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### LITTLE ROCK AND FORT. SMITH RY. Co.

v.

JONES.

(41 *Arkansas Reports*, 157.)

A railroad company is not liable, under our statute, for unavoidable accidents in regard to stock, but the killing of stock by its train being proved, negligence is presumed against the company until disproved.

APPEAL from Sebastian Circuit Court.

Clark & Williams for appellant.

Cohn & Cohn for appellee.

SMITH, J.—This action was brought to recover damages for the negligent killing of a horse by railway train. The verdict was for the plaintiff, and the circuit court refused to disturb it for alleged misdirection of the jury and insufficiency of the evidence.

The plaintiff proved that the animal had escaped from his inclosure at night and was found next morning dead and mangled, near the railroad track; and after proof of its value, rested.

The defendant then proved that the train left Fort Smith at

4.15 A.M.; that the night was dark and foggy, but the engine had a bright head-light, which lighted up the track sufficiently for the engineer to see an object of the size of a man's body lying across the track for the distance of one hundred yards ahead; that the train was running twelve or fifteen miles an hour and could have been stopped within the distance of one hundred feet; that the horse was in a stock-gap, three or three and a half feet deep, just outside of the corporate limits of Fort Smith, and when the engineer first discovered him the engine was not more than sixty or eighty feet from the gap; that he instantly whistled down brakes and reversed his engine, but the train struck the horse and carried his body one hundred yards below, and that it was impossible to stop the train, after the horse was seen, in time to avoid the injury.

The presiding judge signed a bill of exceptions, certifying that the foregoing testimony was produced at the trial, but refused to certify that the engineer had stated in his evidence "that he kept a watch-out ahead from the time the train left the station until the locomotive struck the horse." Thereupon the defendant procured the signatures of by-standers attesting the truth of the exceptions as prepared by its counsel, as provided by Sec. 4698 of Gantt's Digest, and the same was filed as part of the record; but the truth thereof was maintained and controverted by affidavits and counter-affidavits.

The court, at the instance of plaintiff, gave the jury the following directions, to which an exception in gross was reserved:

1. The killing of stock on any railroad track in this State shall be *prima facie* evidence that it was done by the train, and the *onus* to prove the reverse will be on the railroad company.

2. If you find that the horse in question was killed by the train, the presumption is that it resulted from a want of due care on the part of defendant, and that it is such a killing as would entitle the plaintiff to damages equal to the value of the horse at the time it was killed.

3. A railroad company is not liable for an unavoidable accident, even under our statute, in relation to stock. If with every reasonable precaution, proper look-out, and proper speed and proper attention, an unavoidable damage ensue, the company which has by law the right, under such precaution, to run its trains, is not responsible. The presumption is against the road, and the proof, under our law, must be made that there was no negligence or want of ordinary care.

The defendant moved the two following instructions, which were given:

1st. That if the jury find from the evidence that the plaintiff's horse was in a stock-gap when the defendant's locomotive struck him; that it was a dark night and a part only of the animal appeared above the surface of the road, but so that he could not have

been seen or discovered by the engineer on the locomotive until it was impossible to stop the train in time to prevent the killing of the horse, and that the stock-gap was properly constructed, as stock-gaps usually are, and every effort was made to stop the train after the animal was first seen in the gap, they should find for the defendant.

2d. That to entitle the plaintiff to recover, it must appear to the satisfaction of the jury from the proof that the killing of the plaintiff's horse was occasioned by, or was the result of, the neglect or unskilfulness of the defendant's agents or employees, or of a defect or improper construction of the stock-gap.

The defendant has no cause to complain of the charge of the court. It fairly presented the law of the case. And as to the evidence, giving the defendant the benefit of the statement in the second bill of exceptions—that the engineer was on the look-out—there yet remained some small discrepancies in the engineer's story which might fairly have discredited him with the jury. Thus, if the head-light illumined the track for one hundred yards ahead and the engineer was watching out, why should he have failed to see the horse sooner? True he swears that it was impossible to do so on account of the darkness: But that was a question for the jury, and they might well have found that there was no such impossibility. It was proved that the track was straight for two or three hundred yards before coming to the stock-gap.

In *L. R. & Ft. Smith Ry. v. Finley*, 37 Ark. 563, this court held that, although stock be wrongfully on the track, yet the engineer must use ordinary care and diligence to discover it and avoid injury to it; else the company will be liable. And in *L. R. & Ft. Smith Ry. v. Holland*, 40 Ark. —, we defined ordinary care in this class of cases to mean practically that the company's servants must use all reasonable means to avert injury after the animal is seen, or might have been seen, on or near the track.

Again, the testimony was that the train might have been stopped within one hundred feet, and although the conductor testifies that the brakes were promptly applied in response to the alarm whistle, yet the train actually ran one hundred and twenty yards before it was stopped.

The burden was upon the defendant to show by a fair preponderance of evidence that it exercised due caution in the premises, and we do not interfere with verdicts where the law has been properly charged, unless the jury has disregarded either the law or the evidence.

Affirmed.

**Presumption of Negligence.**—As to whether or not any presumption of negligence on the part of the railroad company arises from the mere fact of cattle being killed, see *Wilson v. Norfolk & Southern R. Co.*, and note, *infra*.

## ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. R. Co.

v.

HAGAN.

(42 *Arkansas Reports*, 122.)

When stock is killed by a railroad train, negligence is presumed against the company until excused or disproved.

The fact that stock is found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as in cases of killing or mortally wounding stock; but when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing.

When juries give excessive damages against a railroad company for killing stock, the court should compel the plaintiff to enter a remittitur or submit to a new trial.

APPEAL from Pulaski Circuit Court.

Dodge & Johnson for appellants.

George L. Basham and Clark & Williams for appellee.

SMITH, J.—Hagan obtained a judgment against the railway company for \$391 damages on account of the killing by its trains of one mule, one ox, two sheep, and the wounding of a mare and cow. Of its liability for the value of the ox and sheep, no question is made. They were killed on the railroad track. The burden under the statute was upon the company to show due care in the operation of its trains. And, since no attempt was made to do this, the *prima facie* case became conclusive.

The mule was killed in daylight by a passenger train. But the defendant claimed that it was unavoidable. The track was straight for a considerable distance at the place where the accident occurred; the surrounding country was level and clear of bushes or other obstruction to the view. The locomotive engineer swore that he saw the animal one hundred and fifty yards ahead. It was not then upon the track, but was approaching the track. The alarm whistle was not sounded until the mule got upon the track, nor was any effort made to stop or check the speed of the train, although the engineer had atmospheric brakes at his command. The excuse for this is, that, after the mule came upon the track, the distance was too short to bring the train to a full stop before striking the object; and to lessen the velocity of the train would have endangered the safety of passengers by increasing the liability of the cars to leave the track when the inevitable collision should take place.

We can understand that live stock may spring upon the track so near ahead of a rapidly advancing engine that it would be useless

and might be dangerous, to check up. Under such circumstances, all the momentum which the train has acquired is needed to brush aside the obstacle with as little recoil as possible. But the jury might fairly have inferred, from the engineer's own version of the matter, that proper caution had not been used. Although he saw the mule approaching the track, he did not whistle until it was actually upon the track, nor put forth any effort to slacken speed and get his train under control. This branch of the case thus falls within the rule laid down in *L. R. & Ft. Smith Ry. Co. v. Jones*, 41 Ark. 157.

The same considerations dispose of the injury to the cow, which was in fact struck by the same freight train that killed the ox. It was in daylight, and the engineer could have seen the cattle for a quarter of a mile. The engineer blew his whistle and slackened the train, but did not stop. The cattle were running along the track, and there was a trestle immediately in front of them. The jury might well have concluded that they might have been saved by the exercise of due care.

No witness saw the mare struck by the train, but she was found in a thicket near the railroad with her nose broken, her legs badly cut up, and her shoulder presenting the appearance of a car wheel having passed over it. She was down and could not get up, and the plaintiff abandoned her to the defendant's section boss, who took charge of her. A witness tracked her back to the railroad, and found horse hair, blood and other signs indicating that she had been thrown from the track. There is no explanatory testimony to rebut the statutory presumption of negligence, but it is contended that no such presumption arises unless the animal be killed outright or mortally wounded.

Our previous decisions have made no distinction in this respect between the killing and wounding of an animal. *L. R. & Ft. S. Ry. Co. v. Payne*, 33 Ark. 816; *Same v. Trotter*, 37 Ib. 593; *Same v. Henson*, 39 Ib. 413.

And the act of February 3, 1875, makes none, except that its eighth section declares the killing of stock on the track *prima facie* evidence that it was done by a train. When an animal is found wounded in the vicinity of a railroad, there must be evidence to connect its injury with the operation of the trains. But when the jury are satisfied that the injuries, from their nature and appearance, were inflicted by a passing train, the presumption of negligence attaches equally, whether those injuries be mortal or otherwise.

One ground of the motion for a new trial was, that the damages were excessive. Juries are prone to be somewhat liberal in this class of cases. But it is a matter with which we cannot well interfere, when the evidence in any view of the case warrants their assessment. The only remedy for this evil is, that the circuit



courts should in such cases compel the plaintiff to enter a remittitur or submit to another trial.

Affirmed.

**Presumption of Negligence.**—Whether or not a presumption of negligence arises from the mere fact of the killing of an animal by a railroad train, see *Wilson v. Norfolk & Southern R. Co.*, *infra*.

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BRENTNER

v.

CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Iowa. April 22, 1885.*)

The notice and affidavit of the killing of stock by a railroad company may be served on an officer or agent of the corporation by simply delivering them to such officer or agent, without reading them.

An instruction, in an action to recover damages for cattle killed by a railroad company, that, if the company neglected to build and maintain fences sufficient to keep stock off its right of way under all ordinary circumstances, it was liable for all injury to stock occasioned by such negligence, is erroneous, as it holds the company liable whether the stock were at the time running at large or not.

The burden of proof is on the railroad company to establish the building of a good and sufficient fence, as the statute makes the proof of the fact of killing of cattle on the track *prima facie* evidence of negligence on the part of the company.

A plaintiff who recovers double damages for the killing of his stock by a railroad company is not entitled to interest on the amount of damages recovered, as a part of the verdict.

The court having ordered that the number of trial jurors at each term should be 20, a venire was issued for that number. Two of the number were not served, and two did not appear, and on the first day of the term the court directed the sheriff to fill the panel from the by-standers, which was done. When defendant's case came on for trial, he objected to the panel as thus formed, and demanded that it be filled by the addition of four jurors, who should be selected from the body of the county in the manner provided by the statute. The court overruled the objection, and 12 jurors, three of whom were of those added to the panel by the sheriff, were, against the objection of defendant, sworn as jurors. *Held* that, as the jury were to be drawn from the panel, the refusal of the court to order the panel to be filled in the manner prescribed by the statute was error.

APPEAL from Cerro Gordo circuit court.

Plaintiff seeks to recover double the value of certain cattle which, he alleges, were killed on defendant's railroad track by an engine and train of cars. It is alleged that the injury occurred at a point where defendant had the right to fence its track, but that it neglected to maintain a sufficient fence at said point to keep cattle from entering upon its track, and that the cattle in question,

in consequence of such neglect, entered thereon and were killed. There was a verdict and judgment for plaintiff, and defendant appeals.

Geo. E. Clark for appellant.

Miller & Cliggett for appellee.

REED, J.—At a prior term of the circuit court the judge had made an order which provided that the number of trial jurors at each term thereafter should be 20. A venire was issued for that number for the term at which the case was tried. Two of the number were not served, and two who were served did not appear. On the first day of the term the court directed the sheriff to fill the panel from the by-standers, which was done. When this cause came on for trial defendant objected to the panel as thus constituted, and demanded that it be filled by the addition of four jurors who should be selected from the body of the county in the manner provided by law. This request was overruled by the court. Twelve of the jurors were then called into the box, three of whom were of those added to the panel by the sheriff. Defendant objected to these men serving on the jury, on the ground that they had not been selected and appointed as members of the panel in the manner provided by law. This objection was overruled, and they were sworn as jurors in the case. Defendant excepted to these rulings, and now assigns them as error.

The provisions of the statutes which prescribe the manner in which jurors are to be selected and appointed are quite full and explicit. The trial jurors are to be drawn in the manner prescribed in Code, §§ 239, 240, from the lists of names which have been selected and returned by the judges of election of the various election precincts of the county, and if the whole number thus drawn do not attend, or should any of the number be excused, the panel is to be filled as prescribed in section 232, by a second drawing from said lists, and there is no authority to be found in the statute for selecting and appointing members of the panel in the manner in which the names of the men objected to in this case were added to it. If a litigant has the absolute right to have his cause tried by a jury drawn from a panel the members of which have been selected and appointed in the manner prescribed by law, it would follow necessarily that he would be prejudiced by being compelled to try it to a jury selected in any other manner. It cannot be said, however, that his right is as broad as that; for it is provided by section 233 that the court may discharge a portion or all of the jurors if in its judgment their presence is not required by the business of the term, and if it should afterwards appear that a jury is required, they may be resummoned, or a jury may be impaneled from the by-standers. It is also provided by section 2775 that when the requisite number of jurors cannot otherwise be obtained,

the sheriff shall select talesmen from the body of the county to supply the deficiency. These provisions relate, however, to the selection of jurors for the trial of particular cases, and do not at all affect the manner of selecting and appointing the members of the panel for the term. The litigant may be compelled, then, to try his case to a jury impaneled from the by-standers, as provided in section 233; or if, from any cause, the requisite number of jurors cannot be obtained from the panel, he may be compelled to try it to a jury composed of members of the regular panel and talesmen, or entirely of the latter, as provided by section 2775. But when the members of the jury for the trial of his cause are to be drawn from the panel, he has the right to demand that the panel shall be constituted in the manner prescribed by law. This is expressly held in *Baker v. The Milwaukee*, 14 Iowa, 214.

The question here presented is quite different from that decided in *Emerick v. Sloan*, 18 Iowa, 139. In that case some of the members of the panel had been excused by the court, and the jury was filled up from the by-standers. And it was held that this was not an abuse of discretion by the district court. But in this case, as the jury for the trial of the cause was to be drawn from the panel, we think the refusal of the court to order that the panel be filled in the manner prescribed by the statute operated as a denial to defendant of one of its rights under the law.

2. Plaintiff offered in evidence a written notice and affidavit of the killing of the stock. He also introduced the deposition of a witness who testified that he read a portion of said notice and affidavit to a station agent of defendant, and delivered the same to him. Defendant objected to the admission of the notice and affidavit in evidence on the ground that it was not shown that they had ever been served on defendant in the manner provided by the statute. This objection was overruled, and this ruling is assigned as error. The statute (Code, § 1289) provides that if the "corporation neglects to pay the value or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit in writing, of such injury or destruction has been served on any officer, etc., such owner shall be entitled to recover double the value of the stock killed or damages caused thereto." Defendant's position is that the service of the notice and affidavit should be made in the manner provided for the service of original notices,—that is, by reading the same and delivering a copy thereof to the person on whom the service is sought to be made,—and that as but a portion of the notice and affidavit was read to the agent by the person who attempted to serve it, this does not constitute legal service of the papers.

The statute does not prescribe the manner in which the service shall be made. The provision is simply that the papers shall be served on an officer or agent of the corporation, and we think they

may be served by simply delivering them to the person on whom the service is made. There is no express requirement that they shall be read to him, and there is nothing in the nature of the case which requires that they should be read. The court, therefore, properly admitted the affidavit and notice in evidence on proof that they had been delivered to the agent. See *Mendell v. Chicago & N. W. Ry. Co.*, 20 Iowa, 9. Defendant asked the court to instruct the jury that unless the notice and affidavit were served by reading them to the agent to whom they were delivered, plaintiff could not recover more than the actual value of the cattle killed. Under the view we have taken of the question as to what constitutes service under the statute, this instruction was properly refused.

3. The court gave the following instruction: "Defendant had the right to fence its railway track and right of way at all points except highway crossings and depot grounds. And if it failed to build a good and sufficient fence to keep stock and cattle off from its right of way under all ordinary circumstances, or failed to exercise ordinary care or diligence to maintain and keep the fence in repair after it was built, such failure would constitute negligence on its part, and would make defendant liable for all injury to cattle or stock occasioned by such failure or negligence." The giving of this instruction is assigned as error. The objection urged against the instruction is that it lays down a rule of liability materially different from that established by the statute, in this: that the statute imposes on the corporation the duty to fence its right of way against live-stock running at large, and makes it liable for any injury to such stock caused by its failure to perform that duty, while the rule announced by the instruction is that it is its duty to build and maintain fences sufficient to keep cattle off its right of way under all ordinary circumstances, and that it is liable for all injury to stock or cattle occasioned by its failure to perform that duty. That the instruction states a broader rule of liability than is laid down in the statute is very clear, and as an abstract proposition it cannot be approved. It contains no such qualification as that the cattle must have been running at large at the time of the injury to render defendant liable therefor; but the doctrine of the instruction is that if the corporation neglected to build and maintain fences sufficient to keep stock off its right of way under all ordinary circumstances, it is liable for all injury to stock occasioned by such negligence. Under this rule, the corporation would be liable for injury to stock which, owing to its failure to maintain a sufficient fence to exclude it therefrom, went upon its track and was injured there, although at the time it was not running at large. We would not, however, reverse the judgment on this ground alone. The evidence shows without any conflict that the cattle in question were running at large at the time of the injury complained of. Defendant, therefore, was not prejudiced by the instruction.

4. The court told the jury in another instruction "that the burden of proof is on the defendant to establish the building of a good and sufficient fence." Defendant excepts to this instruction. The position of counsel is that, as plaintiff alleged in his petition that the injury was occasioned by the failure of defendant to build and maintain a sufficient fence, and as this was denied in the answer, the burden was necessarily on plaintiff to establish the allegation. The statute, however, which gives the owner of stock which has been killed or injured on a railway track a right of action therefor (section 1289, *supra*), provides "that in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property." The effect of this provision is to make the fact of the injury or destruction of the property on the railway track *prima facie* evidence of negligence on the part of the corporation. *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 338.

5. The court directed the jury that if they found that plaintiff was entitled to recover for the injury complained of, and that defendant neglected to pay the damages caused thereby for more than 30 days after a notice and affidavit of the loss had been served on it, they should award plaintiff as his damages double the value of the property destroyed, and should also allow him 6 per cent interest thereon from the date of the expiration of 30 days from the service of the notice and affidavit. Defendant assigns the giving of this direction to allow interest as error. The general rule at common law undoubtedly is that interest is not allowed in actions grounded in tort. 3 Pars. Cont. 107; Sedg. Dam. c. 15. In actions of trover and trespass, however, the jury were allowed, where they were satisfied that the plaintiff could not otherwise be justly or adequately compensated, to allow interest in their estimate of the damages. *Hyde v. Stone*, 7 Wend. 354; *Beals v. Guernsey*, 8 Johns. 348; *Kennedy v. Whitwell*, 4 Pick. 466. There is no provision in our general statute on the subject of interest, under which interest can be allowed on claims of this character (see section 2077); and as the statute which affords the remedy provides that the recovery shall be in double the amount of the actual damages sustained by the plaintiff, the presumption is that the legislature intended this award to be in full satisfaction of the injury.

As the law has established a measure of recovery, the courts and juries are necessarily deprived of all discretion in awarding the damages, and they should be assessed alone on the basis created by the statute. We think, therefore, that the instruction is erroneous, and that plaintiff is not entitled to interest on the amount of the damages.

For the errors pointed out the judgment will be reversed, and the cause will be remanded for a new trial. Reversed.

**Presumption of Negligence.**—Whether or not a presumption of negligence arises from the mere fact of the killing of an animal by a railroad train, see *Wilson v. Norfolk & Southern R. Co.*, *infra*.

WILSON

v.

NORFOLK AND SOUTHERN R. R. Co.

(90 *North Carolina Reports*, 69.)

Where an action against a railroad company for damages in killing plaintiff's mule is brought within six months after the accident, the fact of such killing (nothing further appearing) is *prima facie* evidence of defendant's negligence; and the burden of repelling the presumption is upon the company.

The court charged the jury upon the evidence in this case: (1) If the engineer saw, or could have seen by vigilance, the plaintiff's mule upon the track a quarter or half a mile ahead, and could have stopped the train in time to avoid the accident, the company is guilty of negligence; (2) If after thus discovering the mule, it left the track a quarter of a mile ahead of the train, and the engineer had reason to believe that it was no longer in danger, and afterwards the mule ran upon the track a second time and was killed, then the company is not guilty of negligence, unless the engineer could, by the use of the appliances at his command, have stopped the train in time to prevent the injury. *Held*, no error.

CIVIL action tried at Fall Term, 1883, of Currituck Superior Court.

The plaintiff claims damages alleged to have been occasioned by the running over and killing of his mule by defendant's train. The issues submitted were, first, did defendant negligently kill the mule? and, secondly, what was its value? The jury responded in the affirmative to the first issue, and fixed the value of the mule at one hundred and seventy-five dollars.

On the trial, the plaintiff testified in his own behalf that on the first of January, 1883, about 12 or 1 o'clock in the day, his mule got upon the defendant's railroad track and was killed by a train. A mule could be seen three quarters of a mile at the place where his mule was killed, the track being straight and the country open. Soon after the accident the witness went on the road and saw fresh tracks where the mule got on the road, and where it ran down the road, about three hundred yards, to a culvert, and then turned and ran seventy-five or a hundred yards towards the train, and then back about forty feet. One of its legs was crushed, and there were indications that it had been dragged thirty or forty feet. On cross-examination, the witness stated, among other things, that he did not see the accident—no curve in the road for three hundred yards—mule ran the length of twenty-eight rails, each thirty feet long, and ran off twenty yards from the track and back, where he was hemmed in—a train had passed, and



the witness heard two sharp alarm whistles. On re-direct examination the witness stated the relative position of a fence, a ditch, and the railroad culvert. The testimony of the other witnesses for the plaintiff does not materially differ from that of the plaintiff himself.

The defendant introduced the engineer, who testified that on the day mentioned he was running the locomotive of a freight train, and discovered a mule standing on the crossing in plaintiff's field, near a culvert, about half a mile off. He shut off steam, blew on brakes, and rolled down to within a quarter of a mile of the mule, and then sounded "the cattle alarm," when the mule walked off the track. The train then moved on at the rate of about fifteen miles an hour, when the engineer discovered another mule in the field, near the road, on the opposite side from the first mule, which was likewise driven off. The mule that was killed came suddenly and unexpectedly on the track about five steps ahead of the engine, and did not run along ahead of the train. When witness first gave the "cattle alarm," the mule walked off the track into the field, and when it jumped back on the track the train could not have been stopped in time to prevent the accident. He was running at the usual speed, fifteen miles an hour, blew down brakes, and did all in his power to stop the train. Witness was vigilant, but did not suppose the mule would run back on the track after it had gone off.

The defendant asked the court to give the following instructions to the jury:

1. If the jury believe from the evidence that the mule went off the track, then the engineer was not required to anticipate its sudden return to the track, and was justified in proceeding with the train.

2. If they believe that, after leaving the track, it suddenly came back so near the front of the locomotive as to make it impossible to stop the train in time to avoid striking the mule, the company is not responsible for the injury.

3. If the mule had left the track the engineer had a right to proceed on his journey as upon a clear track.

4. It is not negligence in the railroad company or its agents merely because the engineer did not stop to see whether an animal near the track is coming on the track and may be killed.

5. If plaintiff fails to show negligence on the part of defendant or its agents, the company is not liable.

6. If the mule sprang upon the track only a few feet in front of the moving train, the company is not responsible for the accident, unless the train was being carelessly run.

7. If defendant could not have prevented the killing the mule after it was discovered on the track, then the defendant is not guilty of negligence.

8. A railroad company is not guilty of negligence because it does not stop its trains when persons are on the ground near the track; nor is there any greater deference due to live-stock than to human beings.

The court declined to give these instructions, and charged the jury as follows:

This action having been brought within six months after the killing, if nothing further appeared but the fact that the plaintiff's mule was killed by the defendant company on its track, it would be *prima facie* evidence of negligence on the part of defendant, and the plaintiff would be entitled to recover the value of the mule. But there being testimony as to the circumstances attending the killing, the jury must determine, under the instructions of the court, whether the defendant is guilty of any negligence—whether the defendant has rebutted the presumption of negligence. If the engineer saw the mule upon the track a quarter of a mile ahead, or could have seen it by proper watchfulness, running on the track, and could have stopped the train before reaching the point where the mule was killed, then the defendant is guilty of negligence, and the plaintiff is entitled to recover the value of the mule. If the engineer saw the mule that was killed a quarter or half mile ahead, and the mule left the track when the train was a quarter of a mile off, and the engineer had reason to believe that the mule was no longer in danger, and afterwards it ran upon the track in front of the locomotive, then the defendant is not guilty of negligence, unless the engineer could, by using the appliances at his command, have stopped the train after the mule jumped upon the track the second time, so as to prevent the killing.

The defendant excepted to the refusal of the court to give the instructions asked, and to those given; and appealed from the judgment rendered.

Messrs. Pruden & Bunch and W. B. Shaw for plaintiff.

Messrs. Stark & Martin for defendant.

**MERRIMON, J.**—Although the court declined to give the instructions as prayed for, we think it gave the substance of so much thereof as the defendant was entitled to. They were numerous, and some of them consisted simply of statements of legal propositions without regard to the facts of the case, or giving them point and applicability, and some of them were not sound as legal propositions.

It is sufficient, if the court give the substance of instructions prayed for to which a party is entitled, without impairing their force; but when the instruction contains only a legal proposition, it is the duty of the court to apply it to the facts of the case bearing upon the issue submitted to the jury. It is not the province of the court to simply state abstract propositions of law—

it must apply the law to the case and the facts therein. Especially is this necessary in giving instructions to juries. Such instruction should bear upon the various material aspects of the facts, and thus guide the jury in passing upon issues submitted to them; and as well, such instructions ought always to be as simple and pointed as practicable. Jurors are not presumed to be learned in the law, and it is their duty to take it from the court and be governed by it.

The evidence, particularly that as to the immediate circumstances relating to the killing of the mule, was conflicting. The case turned largely upon the facts. Two material aspects of them were presented; one contended for by the plaintiff, the other by the defendant. The court properly submitted the issues to the jury with instructions, first, as to the law applicable if the facts as contended for by the plaintiff were true, and, secondly, as to the law applicable if the facts contended for by the defendant were true.

The mule was killed by the defendant's "engine running upon its railroad." This the statute makes "*prima facie* evidence of negligence on the part of the company" in killing the mule, the action having been brought within six months next after the cause of action accrued. The Code, § 2326.

The burden of repelling the presumption of fact thus raised is upon the defendant, and it could only be rebutted by showing that by the exercise of due diligence, the killing of the mule could not have been avoided. *Pippen v. Railroad*, 75 N. C. 54, and the cases there cited.

The evidence, including that of the engineer, went to show that the railroad was straight, passing through an open field for a long distance in the neighborhood where the mule was killed. It was about one o'clock in the day, and the engineer could, by reasonable diligence, easily have seen the mule on the road one half or three quarters of a mile ahead of the engine; he saw it on the road half a mile ahead and gave the alarm. The evidence is conflicting as to whether or not the speed of the train was slackened; it was moving at about the rate of fifteen miles per hour; the mule ran off, then on the road, and was killed by the engine.

Now, if these facts were true, or substantially true, and nothing else appeared, the presumption of negligence was not repelled. Indeed, there was manifest negligence. It was the plain duty of the engineer to slacken the speed, and if need be, stop the train. In this aspect of the case, the court instructed the jury that, "if the engineer saw the mule upon the track a quarter or half a mile ahead, or could have seen it running on the track, by proper watchfulness, and could have stopped the train before reaching the point where it was killed, then the defendant was guilty of negligence, and the plaintiff was entitled to recover the value of the mule."

There was evidence tending to prove the case as supposed in this

charge, and the plaintiff contended that the evidence proved it. The charge in that view was correct, and is fully sustained by repeated decisions of this court. *Clark v. Railroad*, 1 Winst. 109; *Jones v. Railroad*, 70 N. C. 626; *Pippen v. Railroad*, *supra*; *Farmer v. Railroad*, 88 N. C. 564.

The defendant contended, however, that when the whistle was blown, the mule ran off the road, and it was not the duty of the engineer to anticipate that the mule would run back on the road, and slacken the speed of the train; that it did suddenly run back, and so short a distance ahead of the engine, that it was impossible to stop the train before the mischief was done.

We cannot accept this proposition as true, without qualification. If the mule ran off the road quietly and manifested by its acts no great alarm, but a disposition to get away from the road, or if at first it stood still, off the road, until the near approach of the train, then it suddenly ran back on the road a short distance ahead of the engine and was killed, the engineer being unable to stop the train; in such case there would not be negligence, and the defendant would not be liable.

But in another view, if the mule was greatly frightened at the whistle and the train—was panic-stricken—ran about wildly and recklessly in the immediate neighborhood of the road, and would as likely, in its fright, run on, as from it, and the engineer failed to slacken the speed of the train, and the mule suddenly dashed back on the road and was killed by the engine, this would be negligence, and the defendant would be liable for damages.

It may be conceded that where cattle are quietly grazing, resting or moving near the road—not on it—and manifesting no disposition to go on it, the speed of the train need not be checked; but the rule is different where the cow or mule is on the road and runs on, then off, along, near to, and back upon it. In such a case, reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, stop it until the danger shall be out of the way.

Every intelligent mind grants the importance and usefulness of railroads as instrumentalities in the advancement of civilization, prosperity and happiness of society; but necessary as they are, essential as it may be to business and travel to have the highest rate of speed consistent with safety, it does not follow that these must be had at the reckless and unnecessary sacrifice of the property of individuals. The law implies and requires that in all employments and businesses, however useful or necessary, there shall be observed reasonable care and diligence in respect to the rights of individuals and the safety of property.

It seems to us that every just mind must conclude that, in a case like that last above supposed, the defendant, to say nothing of the safety of human life and its own property, has not the right to

rush on and destroy the mule, cow, or horse, as the case may be, that happens to stray upon its road in a country where cattle and other live-stock are, and have always been allowed to run at large in the fields and forests.

To meet the aspect of the facts as contended for by the defendant, the court charged the jury that, "if the engineer saw the mule that was killed a quarter or half a mile ahead of the train, and the mule left the track when the train was a quarter of a mile away, and the engineer had reason to believe that the mule was no longer in danger, and afterward the mule ran upon the track in front of the engine, then the defendant was not guilty of negligence, unless the engineer could, by using the appliances at his command, have stopped the train after the mule had jumped upon the track the second time, so as to prevent the killing."

The instruction is substantially correct. The court fairly submitted the evidence to the jury in the views of it contended for by the parties respectively. The testimony of the engineer tended strongly to support the view contended for by the defendant. The evidence for the plaintiff tended to show negligence as contended by him. It was for the jury to pass upon the weight of the evidence and find a verdict upon the issues thus fairly submitted to them.

There is no error, and the judgment must be affirmed. Judgment accordingly.

No error. Affirmed.

**Injury constitutes Prima Facie Presumption of Negligence.**—In some States the mere fact that the animal in question has been killed or injured by a passing train of the company defendant is itself taken to constitute a *prima facie* presumption of negligence which the company is bound to rebut. *White v. Concord R. Corp.*, 30 N. H. 207; *Smith v. Eastern R. Co.*, 35 N. H. 357; *Galpin v. Chicago, etc., R. Co.*, 19 Wisc. 604; *McCoy v. California, etc., R. Co.*, 40 Cal. 532; *Danner v. South Carolina R. Co.*, 4 Rich. L. (S. C.) 330; *Murray v. South Carolina R. Co.*, 10 Rich. L. (S. C.) 227; *Roof v. Railroad Co.*, 4 S. C. 61; *Western, etc., R. R. Co. v. Steadly*, 6 Am. & Eng. R. R. Cas. 584; *Western Maryland R. R. Co. v. Carter*, 11 Am. & Eng. R. R. Cas. 482.

It is sometimes so expressly provided by statute. *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *Horne v. Memphis, etc., R. Co.*, 1 Coldw. (Tenn.) 72; *Pippen v. Wilmington, etc., R. Co.*, 75 N. C. 54; *Battle v. Wilmington, etc., R. Co.*, 66 N. C. 343; *Georgia, etc., R. Co. v. Monroe*, 49 Ga. 373; *Louisville, etc., R. Co. v. Brown*, 13 Bush. 475; *Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; s. c., *supra*; *Little Rock & Ft. S. R. Co. v. Jones*, 41 Ark. 157; s. c., *supra*; *St. Louis, I. Mt. & S. R. Co. v. Hagan*, 42 Ark. 122; s. c., *supra*; *Brener v. Chicago, M. & St. P. R. Co.*, *supra*; *Jones v. Columbia & Greenville R. Co.*, 20 S. C. 249; s. c., *infra*; *Roberts v. Richmond & Danville R. Co.*, 88 N. C. 560; s. c., *infra*; *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150; s. c., *infra*.

**Injury does not constitute Prima Facie Presumption of Negligence.**—As a rule, however, the usual rule in negligence cases applies. The mere fact of the killing or injury does not constitute any presumption of negligence. The specific negligent acts complained of must be proved by the plaintiff.

*Lyndsay v. Connecticut R. R. Co.*, 27 Vt. 648; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Northland*, 30 Ill. 451; *Schneir v. Chicago, etc., R. Co.*, 40 Iowa, 887; *Indianapolis, etc., R. Co. v. Means*, 14 Ind. 30; *Mobile, etc., R. Co. v. Hudson*, 50 Miss. 572; *Bethje v. Houston & T. C. R. Co.*, 26 Tex. 604; *New Orleans, etc., R. Co. v. Enochs*, 42 Miss. 603; *Grand Rapids, etc., R. Co. v. Judson*, 35 Mich. 507; *Brown v. Hannibal, etc., R. R. Co.*, 33 Mo. 309; *Scott v. Wilmington, etc., R. Co.*, 4 Jones L. 432; *Holman v. Chicago, etc., R. Co.*, 62 Mo. 562; *Walsh v. Virginia City, etc., R. Co.*, 8 Nev. 111; *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 7 Am. & Eng. R. R. Cas. 588; *McKissick v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 590; *Smith v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 584.

**Duty of Engineer on Perceiving Cattle on Track in Advance.**—When an engineer perceives cattle in advance upon the track, it is ordinarily his duty to slacken speed and take other proper precautions, when it appears that by so doing he is likely to facilitate the escape of the animals from the track. *Searles v. Milwaukee, etc., R. Co.*, 35 Iowa, 490; *Paris, etc., R. Co. v. Mullins*, 66 Ill. 526; *Toledo, etc., R. Co. v. McGinnis*, 71 Ill. 347; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 506; *Lapino v. New Orleans, etc., R. Co.*, 20 La. Ann. 158; *Aycock v. Wilmington, etc., R. Co.*, 6 Jones L. (N. C.) 232; *Jones v. North Carolina R. Co.*, 70 N. C. 826; *Page v. North Carolina R. Co.*, 71 N. C. 222.

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## JONES

*v.*

## COLUMBIA AND GREENVILLE R. R. Co.

(20 *South Carolina Reports*, 249.)

The killing of stock by a railroad train being proved, the law presumes that the injury was done through the negligence of the railroad company, until the contrary is shown. This rule of law is unaffected by the recent statutes requiring stock to be kept enclosed.

If cattle on the road-bed of a railway were trespassers, and while so trespassing are negligently injured, nevertheless, the owner of such cattle would be entitled to recover from the railroad company damages for the injury so done.

Where the killing of cattle by a railroad train was proved, and the company offered no testimony in defence, the Circuit judge committed no error in refusing to charge that the company were not liable unless shown to have been guilty of gross negligence or wilful injury.

No evidence being offered by the defendant, the question of contributory negligence was not involved in the issue submitted to the jury.

This was an action by Thomas Jones against the Columbia & Greenville R. R. Co. commenced in a trial-justice's court, on March 23, 1882, to recover the value of two hogs and one sheep, alleged to have been killed on the railway track by defendant's train.

The hogs were killed by a freight train in December, 1881, before Christmas, late in the evening, just before dark. The sheep



was killed by a freight train in the evening, in January, 1882. The stock got out of plaintiff's pasture alongside of the railroad. The plaintiff did not report the killing to the railroad at the time.

In the case agreed upon, the following statement appears: "Defendant offered no testimony, the complaint served having failed to specify time, or place, or circumstance; and no notice of the stock-killing having been given the railroad company until the summons was served, at least two months after the sheep was killed. The defendant, during the time included, was running six or eight freight trains a day, and two passenger trains. Among so many trains after so long a time, it was impossible to discover by what train, engineer, or conductor the alleged damage was done.

Judgment was rendered by the trial-justice in favor of the plaintiff. Defendant appealed to the Circuit Court, and trial was had *de novo* before his Honor, Judge Wallace, at the February Term, 1883, the testimony on the trial being read to the jury. The verdict was for the plaintiff, for seven dollars and costs.

Notice of appeal was duly given, and exceptions filed, and the case came up to this court on the following grounds of appeal:

1. Because his Honor erred in charging the jury that the killing of stock by the company's train being proved, the law presumes that the injury was done by the negligence of the railway; that this has been the law of South Carolina ever since Danner's Case, and that the stock law has not removed this presumption.

2. Because his Honor erred in refusing to charge that where the law forbids the stock-owner to permit his stock "to run at large beyond the limits of his own land, or the lands leased, occupied, or controlled by him," and where there is no law compelling the railway company to fence its track, if the cattle are at large or have escaped from a fenced pasture, and are killed or injured on the track by the railway company's trains, the stock-owner cannot recover damages against the company.

3. Because his Honor refused to charge that in such case the burden of proof is on the stock-owner to show that he is not guilty of contributory negligence.

4. Because his Honor refused to charge that the stock-owner cannot recover unless the injury is attributable entirely to the fault and negligence of the railway company.

5. Because his Honor refused to charge that if the jury believe the stock were at large because of the owner's negligence, they cannot give him damages unless the railway company is proved guilty of gross negligence, or that the injury was inflicted wantonly and wilfully.

6. Because his Honor refused to charge that the stock-owner cannot recover damages if the jury believe there was a want of due diligence on both sides; and that a mere preponderance of negli-

gence on the part of the railway company will not entitle the stock-owner to recover where both parties are at fault.

7. Because his Honor refused to charge that, under the provisions of the stock law, stock roaming at large on the track or road-bed of a railway company are trespassers, and their owner cannot recover for injury done them by the railway trains unless the company's gross negligence or wilful injury is proved.

W. C. Benet for appellant.

Lee & Blake *contra*.

SIMPSON, C. J.—The action in this case was brought to recover the value of two hogs and one sheep alleged by plaintiff to have been killed on the railway track of the defendant. The plaintiff relied upon the presumption of negligence arising from the naked fact of the killing, as held in the celebrated case known as Danner's Case, 4 Rich. 329. Judge Wallace, who heard the case on appeal from a trial-justice court, sustained the ruling in Danner's Case as applicable to this, no testimony having been offered by the defendant. The appeal controverts this charge of the Circuit judge, and insists that since the passage of the "stock law," which was of force in Abbeville at the time of the killing, that Danner's Case has no application in such cases, and that now, to make railroad companies responsible for the killing of stock, etc., negligence must be affirmatively and expressly proved, as is contended to be the law in all other cases where actions are brought for injuries sustained. In other words, that the stock law has withdrawn such cases as this from the operation of Danner's Case. The appeal contains several other exceptions besides this, but this is the main one and we will consider it first.

There can be no doubt but that the recent acts of the legislature, known as the stock law, have materially and fundamentally changed the previous law, as to the roaming at large of cattle. Prior to the passage of these acts, the law, in its effect, required crops to be fenced in and it permitted cattle to roam at will. It was then no trespass for the stock of one man to graze upon the uninclosed lands of another. Now, however, this is changed, and stock is required to be fenced in, and crops need not be inclosed. There can be no doubt either that the effect of this legislation has been to make the roaming of cattle upon the uninclosed lands of others than the owner of such cattle a trespass, for which such owners may in some form or other be held responsible. These principles are conceded.

Was Danner's Case based on the law first announced above to such extent that the doctrine announced and applied there would not have been announced and applied but for the fact that that law was then of force? Would the presumption of negligence arising from the naked fact of killing as established in that case, have been

established by the court, had the present stock law been of force making it a trespass for the cattle of others to roam upon other lands than that of their owners, instead of permitting, and to some extent legalizing, such roaming? If the foundation of Danner's Case was the law as it then stood as to crops and cattle, requiring the one to be fenced in and the other to be fenced out, then there would be much merit in the appeal and the case would be relieved from many of the difficulties now surrounding it. It would not involve the overruling of Danner's Case or touch the wise doctrine of *stare decisis*, as in that view the underlying principles of law controlling the facts in Danner's Case being changed by subsequent legislation, as it is contended, the question would be presented in an entirely new attitude.

If, however, Danner's Case rested upon other principles than this, principles which have not been impaired by the subsequent stock law legislation—principles which our Supreme Court at that time found well established and settled—then that case would stand directly across the path of the appellant, and the plaintiff might successfully invoke the doctrine of *stare decisis*. Danner's Case was not only solemnly decided after careful examination by the court of last resort, but it has been subsequently approved and affirmed. And that it has been the law of this State since its decision has never been doubted. And although it may seem to be a new principle and not in full harmony with many railway decisions in America, yet it would be a precedent which under the circumstances this court would feel constrained to follow, unless upon examination it is ascertained to have been founded upon a state of facts requiring the application of a different principle of law from that which the facts now require. In fact we would have no other alternative unless we disregarded the settled practice and rules of this court.

There seems to be some misapprehension as to the real point decided in Danner's Case, as well as to the principles upon which it rested. The court did not decide that railroad companies were responsible in all cases where stock were killed on their track, whether the killing was wilful, negligent or accidental; nor did it discriminate between slight, ordinary or gross negligence. These questions were untouched and left under the operation of the common-law rules already established. But what the court did decide was rather in the nature of a rule of evidence than otherwise, determining the *quantum* of testimony which might carry a case of this kind to the jury, and it seems to have been founded upon what the court regarded as a necessity in such cases. The court simply held that the plaintiff, upon proof of the killing, might rest; that this would make out a *prima facie* case of all that was necessary to hold the defendant responsible, and if it remained unexplained, liability attached.

The court did not hold that the proof of negligence was unnecessary, or that it was not incumbent upon the plaintiff to offer such proof, but it held that while this fact was a necessary ingredient in the liability of defendant, yet the proof of the killing, unexplained by the circumstances or by the testimony of the defendant, furnished in itself sufficient evidence of the presence of such negligence as would hold the defendant responsible. The court said: "That the company did not produce witnesses to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defence. They had the witnesses under their control. The plaintiff may not have been present when his cattle were killed and may not be able to discover who were the persons employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is construed into an admission. The same construction may be put on a party's omission to offer testimony in his defence when it is in his power to produce witnesses who might exculpate him." This was the principle upon which the case turned, to wit, the fact that it was in the power of the defendant alone to explain, and that he failed to attempt it. There is not a word or an intimation appearing in the case which involved the stock law as it then existed, as one of the elements of the decision.

Nor can we say that the opinion of the court was unsustained by authority. The cases relied on and cited seem to support it. *Leame v. Bray*, 3 East. 593; *Weaver v. Ward*, Hopk. 134; *Christie v. Griggs*, 2 Cam. 79; *Piggott v. Eastern Counties R. R. Co.*, 54 Eng. Com. L. 228; *Ellis v. Portsmouth & Roanoke R. R.*, 2 Ired. 140. But whether this be so or not, *Danner's Case* was heard in 1851, over thirty years ago. Since then it has been regarded as the settled law of this State. It had the sanction of an unanimous court, Judge Frost delivering the opinion of the court and O'Neill, Evans, Wardlaw and Whitner concurring, than whom neither our judicial gallery nor that of any State has ever furnished a more imposing array. It has grown gray with time, and the country, citizens, railroads and all have understood it and conformed to it. Under these circumstances its roots have gone down too deep to be torn up easily.

In addition to the authorities referred to *supra*, in *Cooley on Torts*, the following is found, which fully accords with *Danner's Case*. Mr. Cooley says: "The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence. This is an affirmative fact, the presumption always being until the contrary appears, that every man will perform his duty. But the *quantum* of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others a more strict showing is required. A bailee who returns in an in-

jured condition an article which has been loaned to him, is by this very condition called upon to explain, for a presumption of fault must arise therefrom against him. If a child is sent into the streets of a city in charge of a spirited team, which, apparently, he is too young and weak to manage, the negligence seems manifest, while there might be no appearance of want of due care had the team been broken down by labor and years. Often the injury itself affords sufficient *prima facie* evidence of negligence. Thus if the buildings of individuals are destroyed by fire originating in sparks from a locomotive, the fire itself is held to be evidence of negligence which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence, &c. There is consequently nothing unreasonable in presuming negligence from the occurrence of an injury and calling upon the railway authorities to rebut the *prima facie* case by showing that they took reasonable care," etc. Cooley Torts, p. 665.

The rule in Danner's Case is not modified either in Murray's, Roof's or Rowe's Case. In Murray's Case, Judge Wardlaw did say, that on account of the fence law which prevailed in the State at that time, "it was not unlawful for the owner of horses or cows to permit them to roam at large upon all lands of his own or of others that were not guarded by a fence such as the law prescribes; and the entry of a horse or cow upon the uninclosed track of the railroad is no trespass. The owner of cattle who permits them to roam runs the risk of all damage which they may receive accidentally, and so may sometimes be said to be negligent of his own interests; but he is not guilty of legal negligence such as embarrass his recovery from a person who through negligence hurts his cattle." He further said: "The court acquiesces, too, in the reference which the recorder made to Danner's Case for the presumption which arises from the killing of the horse by a train of cars established and unexplained, and for the unfavorable inference raised by the absence of all the defendants' agents who were at the killing. Negligence rather than accident is shown by proof of damage done by a train when nothing more appears," etc. 10 Rich. 231. In Roof's Case, 4 S. C. 61, Danner's Case was followed upon the principle of *stare decisis*, and was affirmed in Rowe's Case, 7 S. C. 167. We find, therefore, no error in his Honor's charge as to the first exception.

The other exceptions involve refusals to charge. It is to be regretted that the charge of the judge is not found in the brief. It would have been better to have had it set out in full so that we might have seen what he did say, and, therefore, been better able to determine the force and effect of the exceptions. The second, fifth and seventh exceptions raise substantially the same point, to wit, that inasmuch as under the stock law, cattle roaming at large on the track or road-bed of a railway company are tres-



passers, their owners cannot recover for injury done them by the trains under any circumstances, as urged in the second exception, and in the seventh, unless the company's gross negligence or wilful injury is proved.

We think these requests were properly refused. Certainly, the first could not have been charged, because, even assuming that it might be held to be a trespass for cattle to roam upon a railroad track in those counties where the stock law prevails (as to which we do not now express an opinion), yet this would not have warranted the charge requested. True, where one is a trespasser upon the land of another, either in himself, his servants, or his cattle, he may be made responsible in an action for damages; but we know of no law which would warrant the injured party to take the law into his own hands and kill the trespasser. The courts may redress his wrongs; but he has no authority to undertake to right himself, much less to inflict vengeance.

No doubt some negligence must be proved; whether it must be gross or not is not necessary for us to determine. In fact, the difference which is sometimes attempted to be drawn between different kinds of negligence is so shadowy that it is by no means easy to define clearly what is gross, or what is ordinary, or what is the degree in a special case. But if there be a distinction, it was not necessary for the judge to charge as requested here. The rule in *Danner's Case* required him to say when the killing was proved, that the plaintiff might rest, and if the defendant failed to explain this killing so as to exculpate the company, either by proof that the killing was accidental, unavoidable, or free from negligence, then the fact of killing, with the *prima facie* case which it made, was sufficient, as this furnished all the proof which the case in the first instance required. This the judge charged.

As to the third, fourth, and sixth exceptions. These raise the question of contributory negligence. The facts of the case are not fully stated in the brief; so far as it appears, no testimony was offered by the defendant; in fact, it is so stated in the brief. The question, then, as to contributory negligence, was an abstract question having no reference to the facts. These exceptions may have contained good law, but it was irrelevant here.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

**Presumption of Negligence.**—As to whether or not any presumption of negligence arises from the mere fact of injury to cattle by a railroad train, see *Wilson v. Norfolk & Southern R. Co.*, and note *supra*.

**Railroad Company not Liable for Injuries to Cattle Trespassing on Track.**—It is held in some States that a railroad company is not liable for mere negligence in running over cattle trespassing upon its track. *Corwin v. New*



York & Erie R. Co., 13 N. Y., 42; New York & Erie R. Co. v. Skinner, 19 Pa. St. 298; Drake v. Philadelphia & Erie R. Co., 51 Pa. St. 240; Penna. R. Co. v. Riblet, 66 Pa. St. 164; Hurd v. Rutland & B. R. Co., 25 Vt. 116; Jackson v. Rutland & B. R. Co., 25 Vt. 150; Morse v. Rutland & B. R. Co., 27 Vt. 49; Perkins v. Eastern R. Co., 29 Me. 307; Woolson v. Northern R. Co., 19 N. H. 267; Cornwall v. Sullivan R. Co., 28 N. H. 161; Chapin v. Sullivan R. Co., 39 N. H. 58; Tower v. Providence & W. R. Co., 2 R. I. 404; Stearns v. Old Colony & F. R. Co., 1 Allen, 493; Eames v. Salem & L. R. Co., 98 Mass. 560; Henry v. Dubuque & P. R. Co., 2 Iowa, 288; Locke v. St. Paul & P. R. Co., 15 Minn. 850; Stucke v. Milwaukee & M. R. Co., 9 Wisc. 202; Williams v. New Albany & S. R. Co., 5 Ind. 111; Lafayette & I. R. Co. v. Shriner, 6 Ind. 141; Indianapolis & C. R. Co. v. Kinney, 8 Ind. 402; Indianapolis & C. R. Co. v. McClure, 26 Ind. 370; Indianapolis & C. R. Co. v. Harter, 38 Ind. 557; Little Rock & Ft. Smith R. Co. v. Finley, 11 Am. & Eng. R. R. Cas. 469.

**Railroad Company Liable in Case of Negligence for Injuries to Cattle Trespassing on Track.**—But a contrary view is taken in other States, and a railroad company will be held liable for negligence on the part of its servants in running over cattle trespassing upon the track. Illinois Central R. Co. v. Middlesworth, 46 Ill. 494; Toledo, W. & W. R. Co. v. McGinnis, 71 Ill. 346; Isbell v. New York & N. H. R. Co., 27 Conn. 393; Baltimore & Ohio R. Co. v. Mulligan, 45 Md. 486; Kerwhacker v. Cleveland, C. & C. R. Co., 3 Ohio St. 172; Cincinnati, H. & D. R. Co. v. Waterson, 4 Ohio St. 424; Cincinnati & Zanesville R. Co. v. Smith, 22 Ohio St. 227; Needham v. Santa F. & St. J. R. Co., 37 Cal. 409; Locke v. St. Paul & P. R. Co., 15 Minn. 350; Wither- spoon v. Milwaukee & St. P. R. Co., 24 Minn. 410; Louisville & N. R. Co. v. Wainscott, 3 Bush. (Ky.) 149; Kentucky Central R. Co. v. Lebus, 14 Bush. (Ky.) 518; Louisville & F. R. Co. v. Milton, 14 B. Monr. 75; Nashville & C. R. Co. v. Anthony, 1 Lea (Tenn.), 516; Williams v. Northern Pacific R. Co., 11 Am. & Eng. R. R. Cas. 421; Railway Co. v. Howard, 11 Am. & Eng. R. R. Cas. 488; Western Maryland R. Co. v. Carter, 13 Am. & Eng. R. R. Cas. 573; Simkins v. Columbia & Greenville R. Co., 20 S. C. 259; s. c. *infra*; Alabama Gt. Southern R. Co. v. Powers, 73 Ala. 244; s. c. *infra*.

**Wilful and Wanton Injuries to Trespassing Cattle.**—It is of course admitted by the courts of all the States that if the servants of the railroad company have been guilty of wilful or wanton misconduct in running over cattle, the company is liable without regard to the question whether or not there has been a trespass. Eames v. Salem & L. R. Co., 98 Mass. 560; Maynard v. Boston & M. R. Co., 115 Mass. 458; McDonnell v. Pittsfield & N. A. R. Co., 115 Mass. 564; Darling v. Boston & Albany R. Co., 121 Mass. 118; Hance v. Cayuga & S. R. Co., 26 N. Y. 428; Spinner v. New York Central & H. R. R. Co., 67 N. Y. 153; North Penna. R. Co. v. Rehman, 49 Pa. St. 101; Drake v. Philadelphia & Erie R. Co., 51 Pa. St. 240; Jeffersonville, M. & J. R. Co. v. Adams, 43 Ind. 402; Jeffersonville, M. & S. R. Co. v. Underhill, 48 Ind. 389; Bennett v. Chicago & N. W. R. Co., 19 Wisc. 145; Fisher v. Farmers' L. & T. Co., 21 Wisc. 73; Denver & Rio Grande R. Co. v. Olsen, 4 Col. 239; Central Branch, etc., R. Co. v. Lea, 20 Kans. 853; Atchison, T. & S. F. R. Co. v. Hegwir, 21 Kans. 622.

**SIMKINS**

v.

**COLUMBIA AND GREENVILLE R. R. Co.**

*(20 South Carolina Reports, 259.)*

A horse found upon a railroad track in this State is not a trespasser, not even under the terms of the stock law, where the horse is in its owner's inclosed pasture, through which the railroad has only a right of way.

Negligence is a relative term, and its existence depends upon the requirements of the occasion.

In the running of a railroad train, the employees must regard the safety of the passengers and the property of the company, as well as dangers to cattle and persons on the track, and the question of negligence is influenced by these considerations; but it cannot be said that a railroad company is liable only for gross negligence in the killing of a horse on its track by a train of cars, or for wanton negligence or wilful misconduct.

The court committed no error in refusing to charge the jury "that if it appear that a horse killed or injured by a train was first discovered or was first discoverable on the track at such a short distance from the place where he was killed or injured that the train could not have been stopped in time to prevent running over or against the horse, it was not necessary that the persons running the train should have seen the horse, or, having seen him, that they should have attempted to stop the train."

Horses on a railroad track were killed by a passing train, which was thereby thrown from the track and its engine injured. *Held*, that the injury to the engine was no proper counter-claim in action for damages brought by the owner of the horses against the company.

There being contradictory evidence, the judge properly refused to direct a verdict.

Where a request to charge asserts a general proposition of law, which, so far as applicable to the cause at issue, had already been charged, there is no error in refusing the request.

THIS was an action by Eldred C. Simkins against the Columbia & Greenville R. R. Co., commenced April 7, 1881, to recover \$500 damages for the killing of two horses belonging to plaintiff by a train of cars of the defendant company, on or about March 1, 1881. The defendant denied liability and asserted as a counter-claim injuries done to the engine and cars of the company by the presence of these horses on the track. To this counter-claim there was no reply.

The accident occurred at a trestle, towards which the horses had run on the track from one hundred and twenty-five to two hundred and fifty yards, as estimated by witnesses from the tracks of the horses. All this was within the pasture of plaintiff, through which defendant had a right of way, and the horses were killed about midnight. The employees of the company, in charge of the train, did not know that these horses were on the track until after

the engine had been thrown off by the killing of the horses. As to the speed of the train, the darkness of the night, and the burning of a headlight on the engine, the evidence was conflicting.

The defendant presented several requests to charge. Those which were refused are correctly quoted in the exceptions, and the opinion states the reasons given by the Circuit judge for his refusal. He did charge the jury as follows:

"That under the laws of this State a railroad company is not bound to protect its track by fences or other inclosure from the incursions of horses, cattle, or other animals. That a railroad company is not liable for the killing of a horse upon the track by its train, if such killing is accidental. That a railroad company is not liable for injuries caused by the mere fact that a train was of such length, or was running at such speed at night, that it could not be stopped by the engineer and brakeman short of one hundred or two hundred or even three hundred yards, inasmuch as such running of a train is not negligence or misconduct. That in the absence of proof of gross negligence or wilful misconduct on the part of the railroad company itself, the damages for the killing or injuring of horses on the track can in no event be vindictive, but merely compensatory for the actual loss proven to have been sustained by the same."

And he further charged the jury that the fence or stock laws of this State applicable to Newberry County and other counties at the time these horses were injured changed the rule of law formerly prevailing here, so as to do away with the presumption of negligence on the part of the railroad, derived from the mere fact of killing or injuring stock, and so as to put upon the owner of the stock killed or injured the burden of proving that such killing or injuring was the result of negligence on the part of the railroad or its employees; but that the plaintiff having introduced testimony on the point of negligence, if the jury should conclude from the testimony in the case that there was negligence on the part of the railroad or its employees, they should find for the plaintiff, the owner of the stock.

The jury rendered a verdict for the plaintiff for \$328.

The defendant appealed upon the following exceptions, together with those copied into the opinion:

6. "Because his Honor refused the request of the defendant to charge the jury 'That a railroad company is not liable for the killing or injuring of a horse upon the track by its train, unless such killing or injuring is the result of either wanton negligence or wilful misconduct of the employees running the train.'

7. "Because his Honor refused the request of the defendant to charge the jury 'That since the enactment of the stock or fence laws of this State, the killing or injuring of horses by a railroad train, on its track, in Newberry County, does not put the burden

of proof upon the railroad company, that such killing or injuring was accidental or inevitable, but that in such case it is necessary, in order to make the railroad company liable, that there be proof of wanton negligence or wilful misconduct on the part of the employee or employees running the train.'

8. "Because his Honor refused the request of the defendant to charge the jury 'That if it appear that a horse killed or injured by a train was first discovered, or was first discoverable, on the track at such a short distance from the place where he was killed or injured, that the train could not have been stopped in time to prevent running over or against the horse. it was not necessary that the persons running the train should have seen the horse, or having seen him, that they should have attempted to stop the train.'

11. "Because his Honor refused the request of the defendant to charge the jury 'That where a party seeks to recover damages for injury to his person or property, resulting from the negligence of another, he must show that his own conduct has been free from blame; and it must not appear that he has contributed to the cause of injury on account of which he complains.'"

Suber & Caldwell for appellant.

Moorman & Simkins, *contra*.

SIMPSON, C. J.—The respondent seeks to recover, in this action, the value of two horses, killed on the track of defendant's railroad, by a train of cars passing over them. Unlike the case of Jones against this defendant, just decided by this court [*supra*], the respondent assumed the duty of proving negligence affirmatively by other testimony than the mere killing, and he did not rely upon the presumption arising from the fact of killing as in Danner's Case. The defendant also introduced evidence upon the subject of negligence, and the case was stoutly fought, on both sides, as to that question. The defendant submitted various legal propositions, some fourteen in all, to the Circuit judge, with requests to charge them. The judge declined eleven of these requests, which now constitute the grounds of appeal.

The first four, as is admitted, involved the same principle and hinge upon the same point, and they were discussed before us, on both sides, under the same head. They rest upon the general proposition, that a horse found upon a railroad track in this State is a trespasser, and that all questions as to the liability of a railroad company in the killing of such horse must be adjudicated under the light of the fact that he is a trespasser. No doubt the counsel presenting these requests intended them to apply to Newberry County, the place of trial, as legal propositions arising under the operation of the stock law, and to such other counties in which the stock law had become the law. They intended to claim that in such counties, since the enactment of the stock law, stock were

not at liberty to roam at large as formerly, and if in such cases they were found outside the premises of their owner, it was illegal, and a trespass, and that in such cases the law, as to injuries done them, should be applied under the influence of that fact.

The propositions, however, as presented to the judge, were general in their terms, no reference being made to Newberry County or to the stock law. The judge made a written indorsement on these requests, as follows: "They relate to the general law of the State, and not to the fence law of this (Newberry) county. As a general rule of law in this State, said propositions are contrary to the decisions of this State." It does not appear that any effort was made to correct this misunderstanding of the judge, or to inform him that the requests were founded upon the stock laws of force in Newberry County. On the contrary, the charge as thus indorsed seems to have been submitted to. This court has no power to consider propositions not made below, or to review refusals to charge in the absence of requests to charge. Errors of commission are of course before us, when brought up by proper exceptions, but errors of omission must be founded upon a previous request to the judge, in addition to the exceptions necessary to bring them under our review.

Looking at the requests as understood by the judge, based upon the generality of the terms in which they were couched, there can be no doubt that his ruling was correct. But had he understood the request to have reference to Newberry County, and based upon the stock law of force in that county, according to the view which we take of the question it would not have been error to refuse the request, as we do not think the stock law has any application to the case. The injury complained of was sustained at a point on the track where it passed through an inclosure of the plaintiff, used by him as a pasture for his cattle. The only statute of force at the time the disaster occurred was the act of December 14, 1878. 16 Stat. 689. The language of which is, "That in the counties of Abbeville, Union, Newberry and Laurens, it shall not be lawful for the owner or manager of any horse . . . or neat cattle of any description to permit the said animals or any of them to run at large beyond the limits of their own land."

It is conceded in this case that the railroad company did not own the land upon which its track rested at the point where the damage was done, but was only entitled to a right of way, an easement, over the said land. The act above cited, further provides that "wherever any of the said stock be found upon the lands of another person than the owner, the owner of such stock shall be liable for all damages sustained." It will be observed that the prohibition is against permitting stock to run at large beyond the limits of the owners of land, and the penalty is a liability for damages, if one's stock is found upon the lands of another. In this

case the animals of the plaintiff were not beyond the limits of his land. They were not upon the lands of the defendant. The defendant had only an easement, an incorporeal hereditament, which is something different from land. The plaintiff still retained the ownership of the land, and might lawfully use it in any way not inconsistent with the easement of the defendant.

There was, therefore, nothing unlawful in the act of the plaintiff in permitting his stock to roam at large in his inclosed pasture upon his own land, through which the defendant only had the right of way, and it was not a trespass on his part for his animals to stray upon the track of the defendant's railroad. We have not been able to discover in any of the various acts in relation to the stock law, any indication of an intention to embrace within their provisions the various railroad tracks in this State, and it seems to us clear that the terms used in the act referred to, according to their proper construction, cannot be extended so as to embrace the track of a railroad in which the company has a mere easement, and does not own the land over which the track passes. In our opinion, therefore, all of the grounds of appeal based upon the stock law must be overruled.

Fifth exception. "Because his Honor refused the request, that a railroad company is not liable for killing or injuring a horse upon the track of its train unless such killing or injuring is the result of gross negligence on the part of the employees running the train, or at least on the part of the engineer." The judge allowed this except the word "gross." We think the weight of the authorities sustains the judge's ruling. The subject of negligence has been much discussed, and various definitions have been given of it, and much confusion has arisen in reference thereto. Sometimes it has been held to be a question of fact and left almost entirely to the good sense of the jury. At other times it has been regarded as a question of law, and sometimes it has become a mixed question of law and fact. It is not necessary for us in this case to go into this question and explore the mass of cases in the different States and courts where this subject has been considered and adjudged. The exception itself submits it as a question of fact, and the only objection is that the Circuit judge did not require as a legal proposition that the jury should be limited to such negligence as might be termed gross.

Negligence, as we understand it, is the absence of care, and in its essence, in all of its forms, it implies wrong and fault in the party committing it. There may be different degrees of care. There may be a most assiduous, minute and scrupulous attention governing one's conduct, or there may be that sort of attention which characterizes the conduct of ordinary men, or, still further, that which belongs to the reckless and indifferent. And there may be the absence of all care, substituted by a wanton, wilful act, in-



tended to do injury. The absence of these degrees of care may characterize the negligence which results. In the first class the negligence might be designated as slight; in the second, ordinary; and in the third, gross, if epithets are necessary. Now there are but few cases where that minute and scrupulous attention, referred to above in the first class, is required by the law, and consequently but few cases where slight negligence can be made the foundation of an action for damages. All that the law requires, as a general rule, is that sort of care which prudent men, influenced by personal interest, ordinarily bestow on their business and conduct, and it is the absence of this kind of care which in most cases gives rise to actions at law. This of course includes the third class, where there is not even the care of the reckless and indifferent.

It should be observed here, however, that negligence is a relative term, and its existence in a given case depends upon the requirements of the occasion. I mean to say, that an act may be negligent under one state of facts when the same act under a different state of facts might be entirely free from negligence. For instance, to drive a wild and dangerous horse, and of unusual speed, along a crowded street with hundreds of persons and vehicles on the way, would be a negligent act, for the injurious consequences of which, if any, a party could, no doubt, be held responsible; but to drive the same horse at the same speed along an unoccupied street, or along some secluded road in one's own inclosure, seldom or never travelled by others, might be free from every feature of negligence. So, too, in those counties in the State where the stock law has not become the law, and where cattle are at liberty to roam at large upon railroad tracks and elsewhere at will, for a train of cars to dash forward, without the precaution which should be observed in such cases, might be negligent, whereas the same train, going at the same speed, and without the same precaution, in the counties where the stock law has been adopted, and where the railroad employees had no thought that cattle would be found on the track, would not be a negligent act.

So, at last, the kind of negligence for which a party may be made responsible depends on the degree of care which may be required in the special case. If the care of the most prudent and scrupulous is required, then slight negligence may be actionable. If ordinary care is only required, then the absence of this or ordinary negligence would sustain an action. If the case demands only the care of the indifferent and reckless (and we know of no such case), then gross negligence would be necessary. Negligence in all of its forms, as we have said, implies wrong. It carries with it the idea of fault—a failure to do what is required to be done. And an injury resulting from this failure must be redressed, whether it be a slight, ordinary or gross failure. That is to say, in cases where either of these degrees is actionable under the prin-

ciples laid down above, then an injury resulting from it is entitled to be redressed.

It is true, it has been held in words in some of the States where the rule of the common law as to cattle prevailed, to wit, where the owner was bound to keep them on his own land, that railroad companies could only be made answerable for an injury to them wantonly perpetrated, or, as is said in some of the cases, where the act causing the injury was reckless and wilful. This seems to have been held in Massachusetts, New York, Rhode Island, and in some other of the States. But in Vermont, and in some other States, the doctrine prevails that the company is liable for injuries to cattle upon its track if they could have been avoided by its servants in the exercise of ordinary care. *Pierce Railr. L.* p. 322-326, where the different cases are collected.

These principles, although seemingly in direct conflict, may yet be somewhat harmonized by remembering, as urged above, that negligence is relative, and its character depends upon the care required in a given case; and, therefore, what would be negligence, gross or otherwise, in one case, might have no feature of negligence in another. In the running of a railroad train, the employees must look to the safety of the passengers and of the property of the company, as well as to dangers to cattle and persons on the track, and the question of negligence must be determined by these considerations and others; but after letting these have their legitimate influence subordinating the danger of cattle to these higher interests, we cannot agree to the doctrine, that only gross negligence, to wit, the absence of that care which the reckless and indifferent would give, could alone make the road responsible. We do not see that the fact that stock are required to be fenced in, and are not expected to be found on the track, should release the company from the bestowal of such care as would be reasonable in such a case. It certainly ought not to license the company to any conduct short of gross, wilful and vicious, or, as is said in some of the cases, wilful negligence. We think, therefore, that the circuit judge was warranted in striking out the word "gross" in the exception.

Of course, we do not undertake here to determine what would be slight, ordinary, or gross negligence in these railroad cases. All that we determine is that it is not necessary to show gross negligence, and that liability may attach below this. We think the law requires these companies, even in counties where the stock law prevails, to exercise at least reasonable care, such as ordinarily prudent men would be expected to exercise under the circumstances. Whether this has been exercised in a special case is a question of fact for the jury.

The next two exceptions, the sixth and seventh, in which the judge was requested to charge that nothing short of wanton neg-

ligence or wilful misconduct could make the defendant responsible, are disposed of by what we have already said.

We do not see that the eighth exception involves any principle of law. If it was a fact that the horse was first discovered or was first discoverable at so short a distance on the track that the train could not have stopped in time, then this might have been urged upon the jury as proof that there was no negligence; but we do not see that the judge was required to charge that there was no negligence as matter of law.

The ninth exception alleges error because his Honor refused to charge as requested: "That a counter-claim for damages resulting from the trespassing of the horses set up in the defendant's answer in an action for damages for the killing or injury of horses by the train of a railway company is proper, and must be allowed to the extent of the damages proved to have actually resulted to the railroad from such trespassing, if it appear that such damage to the company was not the result of blamable conduct on the part of the company or the employees running the train." Under the code (section 171) a counter-claim may be interposed: 1. Where the cause of action of defendant, which he attempts to set up by counter-claim, arises out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or is connected with the subject of the action. 2. Where the plaintiff's action is on contract, and the defendant's cause of action is also on contract and in existence at the commencement of plaintiff's action. Lynch's Code, p. 72.

The plaintiff's action here did not originate in contract, so we need not consider any of the grounds above, except that portion of the first which provides for a counter-claim where the defendant's cause of action arises out of the transaction set forth in the complaint, or is connected with the subject of the action. Did the defendant's cause of action, presented in his counter-claim, arise out of the transaction set forth in the complaint, or was it connected with the subject of plaintiff's action? The foundation of the counter-claim is an alleged trespass by plaintiff's horses, which resulted in injury to defendant's engine. The transaction, if it be a transaction, which is the foundation of plaintiff's action, is an injury done to plaintiff's horses by a train of cars of defendant. These two events were nearly contemporaneous in this instance; but did the first arise out of the latter?

There is certainly no necessary connection between two such events. The one may happen, and frequently does happen, without the other; but even when happening at or near the same time, we do not see how the trespass of the horses, even if it be admitted that they were trespassing (which must always be in such cases the first event), can grow out of the injury done to the horses. Let it be assumed that it was a trespass for the horses to

be on plaintiff's track, and this gave the defendant a right of action. The horses were upon the track before the train arrived, and a right of action had accrued to defendant before any cause of action arose to plaintiff.

It may be said, however, that the injury for which defendant seeks by his counter-claim to recover damages occurred afterwards. This is true, but did it grow out of the killing of the horses, which is the transaction constituting plaintiff's cause of action, or did it grow out of the fact that these horses were upon the track and threw the engine off? We do not see that defendant's cause of action grew out of the transaction which is the foundation of plaintiff's suit, in the sense of the counter-claim provided for in the code, or that it has such connection with the subject of plaintiff's action as, under the code, authorizes it to be set up as a counter-claim here. On the contrary, the two causes seem to us to be entirely separate and independent of each other. The foundation of each is a tort. But these torts have no dependence the one upon the other. The alleged tort of the defendant, which constitutes the foundation of plaintiff's action, is the negligent running of defendant's cars by which his horses were killed; the alleged tort of plaintiff, which is the foundation of defendant's counter-claim, was the alleged illegal presence of his horses upon the railroad track by which the train was thrown from the track and the engine injured. The injury to the engine in point of time, it is true, followed in quick succession that of the injury to the horses; but it cannot be said that the illegal presence of the horses on the track, which is the foundation of defendant's counter-claim, arose out of the negligence of defendant in running the cars, which is the foundation of plaintiff's action. Nor was it connected with the subject of plaintiff's action.

In most of the States having the code, similar provisions to ours in reference to counter-claims have been adopted, and in some of the States the terms "transaction," "arising out of," "subject of action," and "connected therewith," have been much discussed. The decisions are not uniform, and from them it is difficult to arrive at a definite and satisfactory conclusion. In some of the States, especially in New York, the tendency has been to limit and narrow the meaning of these terms. In others, the construction has been more liberal. In the first, the principles of the former doctrine of set-off and recoupment, which applied to actions *ex contractu* entirely, have controlled, more or less; in the latter, it has been held that the terms "transaction" and "subject of the action" mean something more than contracts, and that consequently counter-claims may embrace other causes of action besides those arising in contract.

This whole subject is fully discussed with great ability and perspicuity in Mr. Pomeroy's second edition of his Remedies and

Remedial Rights, § 734 *et seq.*, p. 772. And at section 790 will be found a discussion of the "cases in which the demands of both parties are for damages arising from tort," in which he says: "Counter-claims of damages from torts, when attempted to be enforced against causes of action for damages also arising from other torts, have, with few exceptions, been rejected. The courts have been inclined to adopt, or at least to assume as a general principle, that such a cross-demand can never arise from the transaction set forth by the plaintiff as the foundation of his claim." It will be seen, however, that this doctrine has not been universally accepted. And he presents in the foot-note an array of cases from which this principle was extracted. Opposed to this doctrine, he also cites a few cases announcing the principle, that under special circumstances a tort may be counter-claimed against a tort. No doubt this is true where there is an evident connection. Under the former practice, when the law of set-off and recoupment prevailed, it is certain that the cause of action which the defendant attempts to set up here could not have been interposed. Nor do we see, upon our analysis of the counter-claim provision in our code, that it can be done by virtue of the code. Under these circumstances, while the cases in other States are not authority, yet we are disposed to follow on that line in which the most of them seem to have gone; and, therefore, to hold that the Circuit judge was right in refusing this request of the defendant.

Tenth exception. Because his Honor refused the request of defendant to give a binding charge to the jury "to find for the defendant, because of there being in this case no proof, or, at most, a mere scintilla of evidence of negligence on the part of the defendant or its employees." The judge declined this because there was contradictory testimony on that point which must be left to the jury. We see no error here.

Eleventh exception, as to contributory negligence, was refused in the form presented, because, as stated by his Honor, "A charge should not merely state a general rule of law. It should be made in connection with a point in the case on which evidence has been offered. And the above rule, as applicable to horses, has already been charged upon and the defendant held liable for negligence, if proved." A judge is not bound to charge general and abstract propositions of law however sound. They must have some connection with the case and the facts relied on. So far as this principle had reference to the horses, it seems that the judge had charged upon it, and it was not necessary for him to go over that ground again. We think the reason which he gives vindicates his refusal.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

**Cattle Trespassing on Track.**—The authorities upon the subject of the

duty of a railroad company to cattle trespassing upon its track will be found collected in the note to *Jones v. Columbia & Greenville R. Co.*, *supra*.

**Duty of Engineer when Cattle are Ahead on Track.**—As to the duty of the engineer of a railroad train to stop or slacken speed when he perceives cattle ahead on the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *infra*.

**Injury to Trains from Trespassing Cattle.**—A party wrongfully allowing his cattle to stray upon the track of a railroad company is liable for any injury occurring to the trains of the company in consequence. *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *New York & Erie R. Co. v. Skinner*, 19 Pa. St. 298; *Sinram v. Pitts.*, Ft. W. & C. R. Co., 28 Ind. 244; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *Housatonic, etc., R. Co. v. Knowles*, 80 Conn. 881; *N. E. R. Co. v. Smeath*, 8 Rich. L. (S. C.) 185; *Annapolis & E. R. R. Co. v. Baldwin*, 11 Am. & Eng. R. R. Cas. 486.

**Analogous Case.**—In a suit against a railroad company for an injury to cattle occasioned by a failure to fence its track, defendant cannot set off the damage done to the train of the company by collision with the cattle. *Terre Haute & Ind. R. Co. v. Pierce*, 95 Ind. 496; s. c., *infra*

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## MEEKER

v.

CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Iowa. October 23, 1884.*)

When railroad crossings at highways are so constructed that the public can cross with teams and vehicles with reasonable safety and convenience, such crossings are sufficient to protect the company from liabilities for stock killed by trains at such crossings.

When the approaches to a highway crossing are not constructed exactly opposite to each other, it is for the jury to say whether this was such a defect as to render the railroad company liable for the killing of a cow on such crossing.

APPEAL from Tama district court.

This is an action to recover damages for the value of a cow killed by one of defendant's engines at a public crossing, by reason, as it is alleged, of the crossing of the railroad track being insufficient and unsafe. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Struble & Kinne for appellants.

Stivers & Louthan for appellee.

ROTHROCK, C. J.—The amount claimed in the petition was \$40, and the verdict of the jury was \$35.86. No appeal is allowed in such cases unless the record involves a question or questions of law upon which it is desirable to have the opinion of the supreme court; and the trial judge is required to certify that the cause involves



such question. Code, § 3173. The certificate in this case is as follows: "(1) When a railroad company in this State so constructs crossing where highways cross its track that it is reasonably safe for the public to cross with teams and vehicles, is such crossing sufficient to protect the company for stock killed on such crossing while attempting to cross the railroad? (2) If a railroad crossing at public highways and the approaches thereto are so constructed that the public can cross the railroad at such point with teams and vehicles with reasonable safety and convenience, will the railroad company be liable for stock killed on such crossing because the approaches on each side of the railroad are not of the same width immediately at the point where such approaches come to the track, or are not constructed directly opposite each other in whole, but where sufficient of such approaches are opposite each other as to constitute sufficient width for the crossing of the public by teams and vehicles with reasonable safety and convenience? (3) If railroad crossings at highways are so constructed that the public can cross with teams and vehicles with reasonable safety and convenience, are such crossings sufficient in law to protect railroad companies from liabilities for stock killed by trains at such crossings?"

It has been repeatedly held by this court that the certificate, in this class of cases, should state the question of law to be determined in such manner as to explain itself, without reference to the record in the case. Appellant denies the first question answered in the affirmative because the court instructed the jury that if they found that teams and vehicles and cattle could safely cross and recross the railroad, the defendant would not be liable. It is claimed that the instruction required absolute safety in the crossing in order to exonerate the defendant. Taking the instructions together, no such test of the sufficiency of the crossing was made. Of course, the third question certified should be answered in the affirmative; but such answer would not lead to a renewal, because it is, in substance, the same as the instructions given by the court to the jury. As to the second question, all we desire to say is, if the approaches were not constructed exactly opposite to each other, it was for the jury to say whether this was such a defect as to hold the defendant liable for the killing of the cow.

This case is an example of many that are certified to us under the law regulating the appeals in this class of actions. The purpose of the law was to prevent appeals in cases where the amount is but trifling, unless there is an important question of law involved, which should be determined in order that the decision may serve as a precedent. In this case there is no real dispute as to what the law is, but the controversy is, did the court err in its instructions to the jury? With all due respect to the learned district judge who presided at the trial, we think that about the only error in the case consisted in certifying it to this court, and if trial judges would.

give counsel to understand when they enter upon the trial of these cases that no certificate would be given unless upon the court's own motion, the law in this class of cases would be much better administered than it is now. Affirmed.

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**LITTLE ROCK AND FT. SCOTT RY.**

*v.*

**HOLLAND.**

(40 *Arkansas Reports*, 336.)

Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals; and this means, practically, that the company's servants are to use all reasonable efforts to avoid harming an animal after it is discovered, or might, by proper watchfulness, be discovered, on or near the track.

APPEAL from Conway Circuit Court.  
Clark & Williams for appellant.

SMITH, J.—In this action for damages for killing a horse, the pleadings admit the killing by the company's train, but deny negligence. The case bears a striking similarity to Harrison's case reported in 39 Ark. 413. A train of sixteen cars was running at night at a speed of twenty miles an hour, on a grade which descended at the rate of seventy-five feet to the mile. The engine had a bright head-light. An object as large as a man's body could have been seen one hundred yards ahead on the track, but not much was visible on the side.

There was a bridge, thirty-five feet long, across a small stream. As the train reached one end of this bridge, a horse ran out of the bushes and jumped upon the track at the other end. The engineer saw the horse when he left the bushes and instantly whistled "down brakes," reversed his engine, sanded the track, and the train began to slow down. There was not time to sound the alarm whistle, as only a second of time intervened before the horse was struck. No power—not even air-brakes—could have stopped the train after the horse came upon the track, in time to save him.

The plaintiff relied upon the statutory presumption of negligence arising from the animal being found crippled near the railroad track. This presumption was effectually disproved by all the witnesses who had any personal knowledge of the circumstances, and their testimony tended strongly to show that the injury complained of was the result of inevitable accident. The verdict was thus left unsupported by any evidence. As the case must be sent

back, we remark that there was a pretty plain failure properly to charge the jury. Under the state of proof detailed above, the Court denied the following requests of the defendant:

"2. The Court instructs the jury that evidence of witnesses not on the train, to the effect that they did not hear the whistle blow or the bell ring, is not evidence of negligence on the part of defendant's agents.

"4. If the jury believe from the evidence that the horse jumped on the track ahead of the train and so near the train that no efforts that could have been made and no diligence that could have been used, could have avoided the injury, then it was immaterial whether the whistle blew, or the bell was rung, and they will find for the defendant."

Railway companies are not insurers of the lives and safety of all the domestic animals in the country through which their lines run. Ordinary care in the management of their trains is the measure of vigilance which the law exacts of them in their relations to the owners of such animals. And this means practically that the company's servants are to use all reasonable efforts to avoid harming the animal after it is discovered, or might by proper watchfulness have been discovered to be on or near the track.

Reversed.

**Measure of Care required to Animals on Track.**—A railroad company is bound to use ordinary care and diligence to prevent injury to live-stock on its track, but is in no sense an insurer. *Quimby v. Vermont, etc., R. Co.*, 23 Vt. 387; *Trout v. Virginia, etc., R. Co.*, 23 Gratt. (Va.) 619; *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 94; *Great Western R. Co. v. Thompson*, 17 Ill. 181; *Central, etc., R. Co. v. Rockafellow*, 17 Ill. 541; *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Georgia, etc., R. Co. v. Anderson*, 33 Ga. 110; *Peoria, etc., R. Co. v. Champ*, 75 Ill. 578; *Louisville, etc., R. Co. v. Milton*, 14 B. Monr. 75; *Burton v. Phila., etc., R. Co.*, 4 Harr. (Del.) 252; *Chicago, etc., R. Co. v. Packwood*, 7 Am. & Eng. R. R. Cas. 584; *Smith v. Chicago, etc., R. Co.*, 18 Am. & Eng. R. R. Cas. 534.

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## EAST TENNESSEE, VIRGINIA AND GEORGIA R. R. Co.

v.

BAYLISS.

(74 *Alabama Reports*, 150.)

In an action against a railroad company, to recover damages for injuries to stock, when the fact of injury by the defendant or its servants has been shown, a *prima facie* case is made out for the plaintiff, and the *onus* is then cast on the defendant "to acquit itself of negligence, or to show a compliance with the statute;" that is, if the injury occurred at one of the places specified in the statute, and under the circumstances therein detailed, a com-

pliance with the requisitions of the statute must be shown; and if under other circumstances, the evidence must be sufficient to satisfy the jury that it occurred without such negligence as, under the general law governing the doctrine of negligence, would render the defendant liable.

The plaintiff having procured appraisers to value his horse which was killed, and to certify to the correctness of his claim at their valuation against the railroad company, this appraisalment is an admission on his part of the value of the horse as stated; but it is subject to be explained, or rebutted, by proof of any fact connected with the appraisalment which is admissible as a part of the *res gestæ*; as, that he told them to put the lowest cash value on the animal, not exceeding the sum fixed by them, because the agent of the railroad company had promised that the claim should be paid at once without abatement.

When a question calls for irrelevant or illegal evidence, and the answer to it is illegal or irrelevant, an objection to the question is sufficient to exclude the answer; but, where the answer is not strictly responsive to the question, though apparently suggested by it, the objection to the question does not cover the independent matter thus elicited.

In an action against a railroad company, for injuries to stock, the summons and complaint may be served on a "depot-agent" without the affidavit required, in other actions against corporations, when the service is on any other person than the "president, or other head thereof, secretary, cashier, or managing agent."

A claim for damages against a railroad company, for stock killed or injured, is "barred, unless complaint is made within six months after such killing or injury;" but a presentment of the claim in writing, within the six months, to the president, treasurer, superintendent, depot-agent, or agent specially appointed to look after such claims, is sufficient to avoid the bar, although suit is not commenced until after the lapse of six months.

It being shown that the horse which was killed leaped on the track in such close proximity to the engine that it was impossible to stop or check the train in time to avoid the injury, this would not only authorize a verdict for the defendant, but would require it, "provided it was also shown that the engineer kept a proper look-out for stock, and could not have seen the horse, even by the exercise of the very great diligence exacted by his situation;" and in determining whether the engineer kept a proper look-out, "the jury must consider that other duties also devolve upon him, which may interfere, to some extent, with the constancy of uninterrupted observation."

The question of negligence *vel non* is a question of law for the decision of the court, "only when the case is so free from doubt that the inference of negligence to be drawn from the facts is clear and certain;" in all other cases, it is a question of fact for the determination of the jury.

Whether it is negligence for an engineer to run his train at a stated number of miles per hour, is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, etc.; and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident.

The issue of the summons and complaint, not the service of process, is the commencement of the action; and the setting aside of the service, on account of irregularities, does not abate or discontinue the suit.

APPEAL from the Circuit Court of Lawrence.

This action was brought by John W. Bayliss, to recover damages for the killing of a horse by the alleged negligence of the defend-

ant's servants, and was commenced on the 10th of December, 1881. In the original summons and complaint the defendant was described as "the Memphis & Charleston R. R. Co. (East Tenn., Virginia & Georgia R. R. Co., lessee), corporation owned and operated in the State of Alabama, under act of legislature of said State;" and the plaintiff's attorney having made affidavit that the president (or other head), secretary, cashier, or managing agent of the defendant corporation, was unknown to him, the summons was returned executed, December 13, 1881, "by leaving copy of the within summons and complaint with W. V. Chardavoyne, R. R. agent, defendant." At the ensuing April term, 1882, as the judgment-entry recites, "came the Memphis & Charleston R. R. Co., by attorney, and moves the court to set aside the process in this case, because of misnomer of party defendant, and for other reasons in said motion stated;" and this motion being sustained by the court, it was further ordered, on motion of the plaintiff, "that plaintiff have leave to amend his summons and complaint, by striking out the words, 'East Tenn., Virginia & Georgia R. R. Co., lessee,' where they occur in said summons and complaint; and that plaintiff have leave to amend his complaint, by making the East Tennessee, Virginia & Georgia R. R. Co. party defendant; and that an *alias* summons and complaint issue, to be served on said Memphis & Charleston R. R. Co., and also on said East Tennessee, Virginia & Georgia R. R. Co." An *alias* summons and complaint was thereupon issued, which was returned executed, September 1, 1882, "by leaving copy with W. V. Chardavoyne, depot-agent, for E. T., Va. & Ga. R. R. Co., defendant;" also, September 7, 1882, "by leaving copy with James White, agent M. & C. R. R., defendant;" and November 11, 1882, executed "on Memphis & Charleston R. R. Co., by leaving copy with S. R. Cruse, treasurer of said corporation." Each of the corporations appeared, by attorney, and separately pleaded, "in short by consent," 1st, not guilty; 2d, that the plaintiff's claim was not presented in writing, within six months after it accrued, to the president, treasurer, superintendent, or any depot-agent of this defendant, nor was suit brought thereon within said term of six months; 3d, the statute of limitations of one year; 4th, a special plea averring the lease of the Memphis & Charleston road to the East Tennessee, Virginia & Georgia corporation, and the exclusive liability of said latter corporation for all damages at the time of the alleged injury. Issue seems to have been joined on all of these pleas. Before entering on the trial, the East Tenn., Virginia & Georgia corporation moved the court to set aside the service of process on W. V. Chardavoyne, as depot-agent for said corporation, "because said service of process upon him was without an affidavit being made as required by law;" and an exception was duly reserved to the overruling of this motion.

The evidence adduced on the trial, all of which is set out in the bill of exceptions, showed that the plaintiff's horse was killed on the morning of the 16th October, 1881, a few minutes before day-break, by a train which was moving, as the engineer in charge testified, at the rate of thirty-five or forty miles per hour, being about twenty minutes late; and the place was about three quarters of a mile distant from Town Creek station, which the train was approaching. At that place, and for some distance beyond, there was a fence on each side of the railroad; that on the north side being about thirty feet from the railroad track, and that on the south side having a gap in it at the place where the horse was killed. Several witnesses for the plaintiff, who saw the horse and walked over the ground about an hour after the accident, testified from an examination of the horse's tracks, on the north side of the road, that he must have run along the path, parallel with the railroad, from 150 to 175 yards, and been killed just as he jumped on the track, opposite the gap in the fence on the south side; and one of the witnesses stated that, judging from his stride, he must have been running at the rate of a mile in five minutes. The plaintiff's witnesses testified, that the road was level, and the track straight, for about a mile from the place where the horse was killed; while other witnesses stated that there was a down grade on the road at that place, the track running on an embankment, about three feet high; which was succeeded by a shallow ditch near the gap in the fence. The engineer in charge of the train, who was examined as a witness for the defendant, testified, "that he never saw the horse until he sprung on the track about ten feet in front of the engine; that he immediately reached up his hand to sound the cattle alarm, but struck the horse before he could do so; that his head-light was in good order, burning brightly, and was as good as any head-light in use on any railroad; that by it, at that time of night, he was not able to discover an object ahead of him on the track more than one hundred yards; that the head-light, by reason of its focus, enables an engineer to see objects on the track some distance, better than objects near at hand, or on the side of the track; that the equipments and appliances of the engine and train were of the best description, and in perfect order; that he was himself at his post, in the vigilant discharge of his duties, and keeping a sharp look-out ahead, and he did not see any obstacle, or any object anywhere, until the horse jumped suddenly on the track, as stated; that the train was then running at from thirty-five to forty miles an hour, which was not faster than regular schedule time; that the horse, when he jumped on the track, was so near him that it was impossible to stop the train, to reverse the engine, to sound the cattle alarm, ring the bell, or do anything else before the animal was struck; that it takes seven or eight seconds to get an engine reversed, and that the train, at the rate it was then running, could not have been stopped



by any human agency under 250 yards." This was the substance of the evidence adduced on these points.

As to the value of the horse, two of the plaintiff's witnesses testified that he "was worth \$300, or over;" another, that he was worth \$250; while it appeared that two appraisers, selected by the plaintiff, had valued him at \$200. As to this valuation, or appraisal, the plaintiff himself thus testified as a witness in his own behalf: "Witness obtained from Mr. Hartly, section foreman of the railroad, a blank form of voucher for making the usual valuation of stock killed, and selected Mr. Jolly and Mr. Lemay, as two disinterested persons, to value the horse. Witness understood said Hartly to tell him, at the time said voucher was furnished, that he should get the horse valued at the lowest reasonable cash valuation, and he would be paid that in cash without deduction. Said appraisers valued the horse at \$200." "Witness was then asked this question: 'State why the horse was valued at \$200 by the appraisers;'" and answered, "that it was because he told them not to value it above \$200; that he had written to Mr. White about his horse having been killed, and had received no reply, but, from his conversation with said Hartly, he understood that the appraiser's valuation would be paid in cash without deduction, provided it was the lowest reasonable cash valuation, and therefore did not wish them to exceed \$200 in their valuation." To this question and answer, each, the defendant objected, "because it was irrelevant and incompetent evidence, and because it sought to elicit hearsay proof;" and duly excepted to the overruling of said objections. One of the appraisers, who was examined as a witness for the plaintiff, and who testified that the horse was worth \$250, though he had signed the appraisal at \$200, "was asked by plaintiff to state the reason why he appraised the horse at \$200;" and answered, "that it was because plaintiff asked them to place the valuation at the lowest cash value, not to exceed \$200, as he expected to be paid cash for it without deduction." The defendant objected to this question, "because it sought to elicit irrelevant evidence, and evidence calculated to mislead the jury;" and to the answer, "because it was irrelevant evidence, included the *ex-parte* statements of the plaintiff himself, and was calculated to mislead the jury;" and exceptions were reversed to the overruling of these objections.

The court charged the jury, in writing, as follows: "The first question to be determined is, whether the facts entitle the plaintiff to recover against either of the defendants. Under the provisions of the statute, when the plaintiff proves that his horse was killed by the train of the defendants, and that the killing was done in Lawrence County, and also the value of the horse, he has made out a *prima facie* case; and if the proof stopped there, the plaintiff is entitled to recover, provided he also proves that he has presented his claim to the defendant, or brought suit thereon, within six

months after the killing. When the plaintiff has proved the above facts, then the burden of proof is shifted, and it devolves on the defendant to show that it is not liable for the damages resulting from the killing of the horse: *it then devolves on the defendant to show by its proof that it, through its agents and employees, has complied with the provisions of the statute, and has been guilty of no negligence. . . .* Under the statute, it is the duty of the engineer, on perceiving any obstruction on the track, to use all means in his power known to skilful engineers, such as the application of brakes, the reversal of his engine, etc., in order to stop the train; and if you believe that the engineer in charge of this train, on perceiving the horse on the track, failed to use all the means in his power known to skilful engineers in order to stop the train, and that the killing of the horse resulted from such failure on the part of the engineer, then the plaintiff is entitled to recover. But, if you believe, on the contrary, that the killing would have resulted, even though the engineer had used all the means in his power known to skilful engineers, in order to stop his train, then your verdict should be for the defendant, unless you find that the engineer was guilty of some other negligence than that above defined as statutory. *But the plaintiff says, that the defendant, through its engineer, was guilty of negligence in not seeing the horse before he got on the track; that he was running the train faster than schedule time.* It is for the jury to determine whether or not that was negligence on the part of the engineer; and in order to do this the jury must look to all the evidence in the case—the time of night when the accident occurred; the head-light; the speed of the train at the time, whether faster than schedule time; the location of the railroad, with the fences contiguous thereto; the running of the horse parallel with the train and engine, together with all the other evidence; and if they find, from all the evidence, that the engineer in charge of the train did not exercise the care, watchfulness, and skill that a prudent and careful man would exercise in the management of his own affairs, then the defendant is guilty of negligence; and if they find that the killing was the result of such negligence, then their verdict should be for the plaintiff. *But, if the jury believe, from the evidence, that the engineer used all the care and skill that a prudent man could or would have used in the management of his own affairs, then the defendant is not guilty of negligence, and their verdict must be for the defendant.*"

To the several italicized portions of this charge, each, the defendant duly excepted, "and also to so much of said charge as instructed the jury that, in determining the question of negligence *vel non*, they could look, among other things, 'to the speed of the train at the time—whether faster than schedule time.'" The defendant then requested, in writing, the following (with other)

charges, each of which was refused by the court, and exceptions duly reserved to the refusal of each :

" 1. If the jury believe, from the evidence, that the engineer was at his post, and in the discharge of his duty, and was exercising that degree of diligence which very prudent persons observe in the conduct of their own business, then simply because he failed to see the horse, when running on the side of the track, does not make the defendant liable for the accident.

" 2. If the jury believe, from the evidence, that when the horse went on the railroad track, the front of the engine was so near him that it was impossible for the engineer, before the engine struck the horse, to stop the train, or to sound the cattle alarm, then the jury would, upon this state of facts, be authorized to find for the defendant.

" 3. If the jury find, from the evidence, that the accident occurred before daylight, and that the train was then moving at the rate of thirty-five miles an hour, and that the engine was so close to the horse, when he went on the track, that it was impossible to stop before striking him, then, upon this state of facts, the jury would be authorized to find for the defendant.

" 4. The laws of the State do not require that either a railroad, or the lands of individuals, shall be so fenced about and inclosed that domestic animals, going at large, cannot get upon them. Of course, though, the owners of such uninclosed property would be liable for damages resulting from any violence they should do to live-stock straying thereupon, whether caused by acts wilfully or only negligently committed. But it does not follow that they must take upon themselves the care or protection of such wandering stock, or that they must, from fear of doing hurt thereto, refrain from using their own premises in any lawful manner beneficial to themselves. The owners of animals thus turned out, to go at large upon the premises of another, must bear the loss that must come to them from any mere accident not attributable to the positive misconduct or carelessness of another person. Therefore, if the jury believe, from the evidence in the case, that the plaintiff's horse was turned out, by those in charge of him, to run at large in a field, and upon the uninclosed track of the railroad, and, whilst so running at large, strayed at or near said track, and got upon it, and was run over and killed by the cars of the railroad, the defendants would not be liable for such killing, if the jury should conclude, from all the evidence and circumstances of the case, that the killing was not the result of the positive misconduct or carelessness of the defendants, their agents, or servants.

" 5. A railroad certainly has a right to the free and uninterrupted use and enjoyment of its road-bed ; and this right is the same in character and degree that the owner of the freehold has to the exclusive use, enjoyment and occupation of his premises. Therefore,

if the jury should find that the plaintiff's horse went upon the track of the railroad, where he was run over, or hit by the engine, and killed, and should conclude, from all the evidence in the cause, that the killing was not the result of the positive misconduct or carelessness of the defendants, their agents, or servants, then they would not be liable therefor, and the verdict of the jury should be for the defendants.

"6. If the jury find, from the evidence, that the plaintiff did not present his claim for damages, in writing, within six months from the day his horse was killed, to the president, treasurer, superintendent or some depot-agent of the defendants, or either of them, the plaintiff cannot recover in this suit.

"7. The engineer was not, as a matter of law, required to see the horse when he was running at the side of the track.

"8. If the jury find, from the evidence, that the engineer was running the train at the rate of thirty-five or forty miles an hour, they are not warranted in inferring that rate of speed was negligence of itself."

The jury returned a verdict in favor of the plaintiff, against the East Tennessee, Virginia & Georgia R. R. Co., and the court thereupon rendered judgment against said corporation, and that the other defendant go hence. The appeal is sued out by said railroad corporation, and all the rulings of the court to which exceptions were reserved, together with the judgment on the verdict, are now assigned as error, making thirty assignments in all.

Humes, Gordon & Sheffey for appellant.

W. P. Chitwood and James C. Kumpe for appellee.

SOMERVILLE, J.—In the case of the Mobile & Ohio R. R. Co. v. Williams, 53 Ala. 595, the question as to the burden of proof, in suits for injuries to stock by the cars and locomotives of railroad companies, is fully discussed; and the rule is announced that when the fact of the injury by the company, or its servants, is proved by the plaintiff, a *prima facie* case exists, and the burden of proof is then on the railroad company, which is sued as defendant, "to acquit itself of negligence, or to show a compliance with the statute." If the injury occurs at the places, and under the circumstances detailed in section 1699 of the Code, then it will be sufficient to show a compliance with the requirements of the statute. If under other circumstances than these, the evidence must be sufficient to satisfy the mind of an unprejudiced jury that the injury occurred without such negligence as would render the defendant liable under the general rules of law governing the doctrine of negligence.

Whatever doubts may be entertained as to the strict soundness of the construction placed upon sections 1399 and 1401 of the Revised Code of 1867, by the opinion of the court in that case, we are unwilling to disturb its authority, for the reason, that the sec-

tions construed have since been re-adopted by the General Assembly into the present Code of 1876, and this was an adoption of the judicial construction previously placed upon them. Code, 1876, §§ 1698-1700; *Ex parte* Matthews, 52 Ala. 51. The case has, moreover, been several times followed in subsequent decisions of this court. *S. & N. R. R. Co. v. Thompson*, 65 Ala. 74.

There was no error in the charge of the Circuit Court in reference to the burden of proof, which is admitted to be in accordance with the rule above stated.

The fact that the plaintiff had valued his horse, claimed to have been killed, at only two hundred dollars, or suffered it to be so valued by the appraisers whom he selected and procured to certify to the correctness of his claim, was an admission on his part as to the just value of the animal. This could be rebutted by any fact tending to show that this valuation was not based upon the real and true opinion of the persons selected to make the appraisement. It was a part of the *res gestae*—the act of appraisement itself—that the seemingly low valuation was induced by the plaintiff's own persuasion; and hence the testimony of the several witnesses on this point was unobjectionable, whatever objection there may have been to the form of the question by which it was elicited. Where a question is obnoxious to objection, which is duly interposed, and the witness makes an answer to it not strictly responsive, but apparently suggested by it, the objection to the question does not cover the independent matter thus elicited. *Barnes v. Ingalls*, 39 Ala. 193. It is only where the answer itself is irrelevant or illegal evidence, and is called for by the question propounded, that no separate objection to the answer is required. *Gilmer v. City Council*, 26 Ala. 665.

The motion to set aside the service of the summons and complaint, for the want of a proper affidavit, was properly overruled. Where a suit is brought against a railroad company for injury to stock cognizable in a Circuit Court, process may be executed on any one of the officers or agents designated in section 1714 of the Code, among whom is expressly included "a depot-agent;" and for this purpose no affidavit is required. Code 1876, § 1714. It is only in suits of another nature, other than for injuries to stock, that the affidavit required by section 2935 of the Code is required to be made, and then only where the road sued is a corporation.

A claim for damages to stock injured or killed by a railroad train is barred, under the statute, "unless complaint is made within six months from the date of such killing or injury." Code 1876, § 1711. This may be done by presenting the claim, in writing, to "the president, treasurer, superintendent, or some depot-agent of the railroad company" (*Ala. Gr. Southern R. R. Co. v. Killian*, 69 Ala. 277; Code, § 1701;) or by bringing suit against the railroad company within the required time. *S. & N. Ala. R. R. Co. v.*



Morris, 65 Ala. 193. So, if the company appoints a special agent for the purpose of reporting such claims, and the claim is referred to such agent, and he reports it in writing to the company within six months, this has been adjudged sufficient. S. & N. Ala. R. R. Co. v. Brown, 53 Ala. 651.

It is true that the present suit was not commenced against the appellant within six months from the date of the injury sued for; but there was evidence tending to show that the claim was presented to the depot-agent of the defendant, and also to their authorized agent, White, who was appointed to look after such claims. The sixth charge requested by the defendant was properly refused, because it entirely ignored the alleged presentation to White, and his probable transmission of it to the company, and also withdrew from the jury, as a question of fact, whether the space of six months had elapsed from the time of the injury to the date of bringing the suit.

If the testimony of the engineer was true, to the effect that, when the horse leaped on the track, he was in such close proximity to the engine that it was impossible to arrest the progress of the train so as to prevent the injury, this state of facts would not only authorize the jury, but would render it their duty, to find a verdict for the defendant, provided that the engineer had kept a proper lookout for stock, and could not have seen the horse, even by the exercise of the very great diligence exacted by his situation. We have often announced the rule, that the law demands of railroads and their servants that degree of care which very prudent persons take of their own affairs, and that infallibility is not required. Cook v. The Central R. R., etc., 67 Ala. 533, and cases cited. In determining whether the engineer was guilty of negligence in looking out for probable obstructions on the track, the jury must consider that other duties also devolve upon him, which may interfere, to some extent, with the constancy of uninterrupted observation.

In all cases not free from doubt, either where the evidence is conflicting, or where it is not, and different minds may reasonably draw different inferences or conclusions on the subject, the question of negligence is one of fact for the determination of the jury. It becomes a question of law, to be decided by the court, only when the case is so free from doubt as that the inference of negligence to be drawn from the facts is clear and certain. The City Council of Montgomery v. Wright, 72 Ala. 411; Whart. on Negl. § 420; Lanier v. Youngblood, at present term.

In view of these principles, the first and seventh charges requested by the appellant were erroneous, in submitting to the determination of the court, as matter of law, the question of the engineer's negligence *vel non*, based upon his alleged failure to keep a proper look-out; and the second and third charges were also objectionable, in withdrawing the consideration of this question en-



tirely from the jury. These charges were, therefore, properly refused.

Whether it be negligence for an engineer to run his train at a certain rate, or number of miles per hour, cannot be said always to be a question for the court to determine. It is most generally a mixed question of law and fact, dependent upon many controlling circumstances, including the condition and structure of the road, the relative straitness of the road-bed, or declivity of the grading, the character and capacity of the brakes in use, and other circumstances of like kind. There is no proof as to these various conditions in the present case, and we are not able to say that it was, or was not, *per se* negligence for the engineer to have been running his train at the rate of from thirty-five to forty miles per hour, at the time of the accident in controversy. This question was properly left to the jury, and the several charges requested by defendants were erroneous, which sought to devolve its determination upon the court as a pure matter of law.

We are unable to see upon what ground the fourth and fifth written charges requested by the defendants were refused to be given. The killing of plaintiff's stock must have been attributable either to positive misconduct, in the nature of a wilful or intentional act on defendant's part, or else to carelessness, or to inevitable accident. If it was not the result of either of the two first causes, it certainly was of the last, and was, therefore, in such event excusable. The refusal of these charges was error, the preliminary portions of them being unobjectionable. *M. & O. R. R. Co. v. Williams*, 53 Ala. 595, 597.

The effect of quashing the service of the summons and complaint upon the Memphis & Charleston R. R. Co. did not, as contended by appellant's counsel, operate to discontinue or abate the suit. The issue of the summons and complaint was the commencement of the suit, and its pendency was totally unaffected by the act of the court in setting aside the service for irregularity. *Cotton v. Huey*, 4 Ala. 56; *Maverick v. Duffie*, 1 Ala. 433. The only effect was to necessitate the issue and service of an *alias* process.

Reversed and remanded.

**Presumption of Negligence.**—As to how far the killing of stock constitutes a presumption of negligence on the part of the railroad company, see *Wilson v. Norfolk & Southern R. R. Co.*, and note, *supra*.

**Duty of Engineer as to Cattle ahead on Track.**—Upon this subject see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *infra*.

**Speed of Trains.**—As to the duty of a railroad company with regard to the speed of its trains, see *Louisville & Nashville R. R. Co. v. Marriott*, and note, *infra*.

## LITTLE ROCK AND FORT SMITH RY. CO

v.

TURNER, Adm'r.

(41 *Arkansas Reports*, 161.)

The engineer saw the mule which was killed as it came upon the track, about sixty yards in front of the engine, and immediately caused the brakes to be put on, reversed his engine, and sounded the alarm whistle, but it was impossible in so short a distance to stop the train, and avoid the collision. *Held*, no negligence.

APPEAL from Faulkner Circuit Court.

Clark &amp; Williams for appellant.

J. H. Harrod for appellee.

SMITH, J.—This was an action for the recovery of the value of a mule, alleged to have been killed by a passenger train. The defendant admitted the fact of the injury, but denied all negligence, and alleged affirmatively that the cause of the injury was the plaintiff's carelessness in hobbling the mule and turning it out in the vicinity of the railroad.

The evidence tended to prove that the plaintiff had tied the mule's head to one of its forefeet with a halter to prevent it from breaking fences, and had turned it out to graze upon the commons; that the train was running at the speed of twenty or twenty-five miles an hour, which was not above schedule time; that the engineer first saw the mule in the act of coming upon the track, about sixty yards in front of the engine; that the brakes were immediately called for and put on, the engine reversed and the alarm whistle sounded, but the track was wet and slippery, and the hobbled condition of the mule impeded its motion and prevented it from getting out of the way; that the train was not materially checked before the mule was struck, and it would have required not less than one hundred yards, perhaps two hundred in the existing state of the track and with only hand-brakes and other appliances then at hand, in which to stop the train.

The jury found a verdict for the plaintiff. One of the assignments in the motion for a new trial assailed the verdict as being contrary to the evidence.

Several questions have been argued here, but we notice only one. A new trial should have been granted on the merits. The statutory presumption of negligence, arising from the circumstance that the mule was run down by the train, was as completely rebutted as it is possible for evidence to rebut it in any case. The engineer and fireman, the only eye-witnesses of the accident, told

a plain and consistent story. Their testimony as to the substantive facts of the injury was not discredited, nor was it even controverted by the plaintiff's witnesses.

In *Kentucky Central R. Co. v. Talbot*, 78 Ky. 621, the court of appeals of Kentucky, construing a similar statute, say: "The statute is in derogation of the rule (that negligence must be affirmatively proved) and grows out of the difficulty ordinarily supposed to exist with the plaintiff in making proof of facts presumed to be peculiarly within the knowledge of the defendant or its employees. Therefore whenever the conscience of those in whose breasts the fact, if in existence, is presumed to rest, are purged, the reason for the law ceasing, the ordinary rule ceases, the *prima facie* case is overcome, and the plaintiff has failed to make out his case. It appears to us that the only safe and just rule in a case arising under this statute is, that the railroad company should be required, when in its power, to introduce as witnesses those employees who, from the circumstances of the particular case, would be presumed to know whether there had been any negligence on the part of the company; and when, unimpeached, such witnesses testify that there was no negligence, and the circumstances do not contradict them, the law is for the defendant."

We have not attached any special significance to the fact that the mule's foot was fettered. If it was negligence in the owner to turn his beast loose in this condition, it was probably too remote to affect the case, provided the defendant could by the exercise of ordinary care have avoided injuring it. In *Davis v. Mann*, 10 Mees. & W. 545, the plaintiff, having fettered the forefeet of his ass, had turned it into a public highway. The ass was grazing on the side of the road, when the defendant's wagon and team, coming down the road at a "smartish pace," ran against the ass, knocked it down and killed it. The driver of the wagon was some little distance behind the horses. Erskine, J., told the jury that, though the plaintiff's act, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant; and he directed them to find for the plaintiff, if they thought the accident might have been avoided by the exercise of proper care on the part of the driver. And a rule for a new trial, on the ground of misdirection, was refused by the court of exchequer. See also *L. R. & F. S. Ry. v. Finley*, 37 Ark. 536.

Reversed and remanded for a new trial.

**General Reference.**—As to the duty of a railroad company when the engineer perceives cattle ahead upon the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *infra*.

## CHICAGO, ROCK ISLAND AND PACIFIC RY. Co.

v.

KENDIG.

(79 *Missouri Reports*, 207.)

A statement setting forth the ownership of a steer, the fact that it was killed by the negligence of defendant's servants, and the amount of the damage held to set forth a good cause of action for the negligent killing of the steer by a railroad company.

If the agents of a railroad company in charge of a train run its engines or cars upon or over live-stock, and such collision could be avoided by the exercise of reasonable care and vigilance on their part, the company will be liable to the owner for the resulting damages.

Instructions which announce mere abstract propositions of law, or single out and comment upon particular facts, are properly refused.

If live-stock is or could be seen approaching a public road-crossing before it gets on a railroad track, the company may be guilty of negligence in case of a collision, although such stock be not seen on the track in time to avoid the injury.

APPEAL from Clinton Circuit Court.

Shanklin, Low & McDougal for appellant.

William Henry for responden

NORTON, J.—Plaintiff commenced this action before a justice of the peace and obtained judgment in the circuit court where it had been taken by the appeal of defendant, and it is now before us on the appeal of defendant. After charging that defendant was a corporation operating its road through Shoal Township in Clinton County, it is averred in the statement as the cause of action that "such corporation, the defendant, on or about the 30th day of June, 1878, in said township of Shoal, by and through its officers, agents and servants, negligently and carelessly ran its railroad cars and engine against, over and upon, and injured and killed a certain dark-red steer, of the value of \$30, the property of plaintiff, to his damage in the sum of \$30, for which sum plaintiff prays judgment."

The above statement sets forth a good cause of action, and the questions presented by it are free from complexity. These questions are, was plaintiff the owner of the steer; was it injured and killed by the negligence of defendant's servants and agents; and, if so, what was the damage? And all of them were fairly submitted to the jury in the instructions given.

On behalf of the plaintiff the jury were told that if they believed from the evidence that plaintiff owned the steer and that it was killed in Shoal Township, Clinton County, by the carelessness and negligence of defendant's servants in operating the train, they would

find for plaintiff and assess his damages at such sum as they might believe from the evidence he had been damaged. They were further instructed that negligence is the lack of such care and caution as men of common-sense and prudence generally exercise under like circumstances, and that if defendant's agents in charge of the train, ran its engine or cars upon or over plaintiff's steer, and if such collision and injury could have been avoided by the exercise of reasonable care and vigilance on their part, then defendant was liable.

On the part of defendant the jury were told that if plaintiff's steer got on the track at the public crossing when the engine was approaching, and so near as to be impossible to stop it before striking, they should find for defendant; they were also told that negligence was a question of fact, and consists in doing what a prudent person would not do, or in failing to do what a prudent person would do under the circumstances, and some commission or omission as above defined on the part of defendant's servants or agents must be proved before they could find for plaintiff, and that the burden of proving negligence was on the plaintiff.

These instructions fairly covered all the points in issue in this case; and we perceive no ground of complaint against the action of the court in giving plaintiff's instructions. Like instructions in a like case have received the sanction of this court. *McPheeters v. Hann. & St. Jo. R. R. Co.*, 45 Mo. 22.

The instructions asked by defendant and refused, were properly refused, because the propositions announced were mere abstractions, and subject to the further objection of singling out particular facts, in the nature of comment on the evidence.

The case of *Wallace v. Railroad Co.*, 74 Mo. 594, to which we have been cited as establishing the doctrine that a railroad company can only be guilty of negligence in killing stock in an incorporated town or at a public road crossing, in a case where the animal is seen on the track in time to avoid the injury, is misconceived by counsel. What was there said was intended to apply to the facts of that case, which were that the animals when first seen were on the track running from side to side of the track. There was no evidence in that case, as in this, that the animals were seen approaching the crossing before they got on the track, and could have been seen at a point on the railroad eighty or ninety rods distant from where they were approaching the crossing.

Judgment affirmed. All concur.

**General Reference.**—As to the duty of an engineer of a railroad train generally upon seeing cattle ahead on the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *infra*.

## KANSAS CITY, FT. S. AND G. R. CO.

v.

HINES.

*(Advance Case, Kansas. November 28, 1884.)*

In an action by the owner of a cow for injuries to her by a railroad company, the evidence tended to prove that the cow was standing upon the railroad track in plain view of an approaching train; that she could have been seen by those in charge of the train 800 feet before the engine reached the place where she stood; that the train was moving at the rate of about 10 miles per hour; that it could have been stopped within 600 feet, but that it was not stopped, nor even slacked in its motion, and the whistle was not sounded; but the train moved on, and when the engine approached within about 15 feet of the cow she attempted to escape, and ran along the track about 30 feet, when the engine overtook her and struck her on the left hip, throwing her from the track and causing the injuries for which the plaintiff sued. *Held*, that such evidence tended to prove negligence on the part of the railroad company.

ERROR from Bourbon County.

Wallace Pratt and Blair & Perry for plaintiff in error.

West & Humphrey for defendant in error.

VALENTINE, J.—This case has once before been to this court. *Kansas City, Ft. S. & G. R. Co. v. Hines*, 29 Kan. 695. When the case was returned to the district court, it was again tried by the court and a jury, and judgment was again rendered in favor of the plaintiff, Hines, and against the defendant railroad company; and the defendant, as plaintiff in error, again complains. On the second trial of the case in the district court the same agreed statement of facts was introduced in evidence as was introduced by the plaintiff on the first trial, and such other evidence was introduced as the plaintiff chose to introduce. The defendant did not choose to introduce any evidence, but submitted the case upon the plaintiff's evidence. The action was for alleged injuries by the defendant to the plaintiff's cow. The evidence tended to prove that the cow was standing upon the railroad track, in plain view of an approaching train; that she could have been seen by those in charge of the train 800 feet before the engine reached the place where she stood; that the train was moving at the rate of about 10 miles per hour; that it could have been stopped within 600 feet; but that it was not stopped, nor even slacked in its motion, and the whistle was not sounded; but the train moved on, and when the engine approached within about 15 feet of the cow she attempted to escape, and ran along the track about 30 feet, when the engine overtook her and struck her on the left hip, throwing her from



find for plaintiff and assess his damages at such sum as they might believe from the evidence he had been damaged. They were further instructed that negligence is the lack of such care and caution as men of common-sense and prudence generally exercise under like circumstances, and that if defendant's agents in charge of the train, ran its engine or cars upon or over plaintiff's steer, and if such collision and injury could have been avoided by the exercise of reasonable care and vigilance on their part, then defendant was liable.

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Judgment affirmed. All concur.

**General Reference.**—As to the duty of an engineer of a railroad train generally upon seeing cattle ahead on the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *infra*.

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the track and causing the injuries for which the plaintiff sued. The jury found a general verdict in favor of the plaintiff and against the defendant, and also found that the defendant was guilty of negligence in not giving "the customary signals," and in not "slowing up" the train.

We think the evidence tended to prove negligence, and therefore that it cannot be said that the verdict of the jury is wrong. There was no conflicting evidence. With reference to the points made by counsel for plaintiff in error, defendant below, we would say :

1. As to their point "A," see the case of *Stewart v. Manhattan, A. & B. R. Co.*, 27 Kan. 631; s. c., 13 Am. & Eng. R. R. Cas. 503.

2. As to their point "B," the trial court was not asked to charge the jury with reference to the question of contributory negligence, nor was the evidence such as to require the court to so charge.

3. As to their point "C," the evidence does tend to prove negligence.

4. As to their point "D," the testimony of Lucas and Hulbert was not in any manner erroneously prejudicial to the substantial rights of the defendant. A part of it may have been immaterial in the case, and another part may have been unnecessary, as the court might have taken judicial notice of the facts testified to without proof. We think that a court may take judicial notice that it is generally the duty of the employees of a railroad company in charge of a moving train to sound the whistle whenever stock is on the track in front of the train, and also to slacken the speed of the train, or even stop it, if necessary and practicable to avoid coming in contact with the stock. The rest of the testimony of said witnesses was competent and proper.

The judgment of the court below will be affirmed.

All the justices concurring.

**Duty to Slacken Speed or Stop Train when Cattle are on Track.**—It is the duty of an engineer in charge of a railroad train when he sees cattle ahead upon the track to slacken the speed of his train, or even to stop it when such course seems necessary to preserve the cattle from injury. Generally, however, such a precaution is not necessary. *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Illinois, etc., R. Co. v. Wren*, 43 Ill. 78; *Rockford, etc., R. Co. v. Linn*, 67 Ill. 110; *Paris, etc., R. Co. v. Mullins*, 66 Ill. 526; *Toledo, etc., R. Co. v. McGinnis*, 71 Ill. 847; *Rockford, etc., R. Co. v. Rafferty*, 73 Ill. 58; *Aylock v. Wilmington, etc., R. Co.*, 6 Jones L. 232; *Jones v. North Carolina R. Co.*, 70 N. C. 626; *Page v. North Carolina R. Co.*, 71 N. C. 222; *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 506; *Searles v. Milwaukee, etc., R. Co.*, 35 Iowa, 490; *Lapine v. New Orleans, etc., R. Co.*, 20 La. Ann. 158; *Little Rock & Fort S. R. Co. v. Trotter*, 37 Ark. 593; s. c., 11 Am. & Eng. R. R. Cas. 475; *Simkins v. Columbia & Greenville R. Co.*, 20 S. C. 259; s. c., *supra*; *Chicago, R. I. & P. R. Co. v. Kendig*, 79 Mo. 207; s. c., *supra*; *Memphis & Little Rock R. Co. v. Sanders*, 43 Ark. 225; s. c., *infra*; *Louisville & Nashville R. R. Co. v. Marriott*, *infra*.

**First Duty of Engineer is for Safety of Train.**—But the first duty of an engineer is of course to his passengers, and he is not bound to slacken speed

or to attempt to stop the train if the lives of the passengers would be thereby imperilled. *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield, etc., R. Co.*, 115 Mass. 564; *Darling v. Boston, etc., R. Co.*, 121 Mass. 118; *Smith v. Chicago, etc., R. Co.*, 34 Iowa, 506; *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66; *Raiford v. Miss. Cent. R. Co.*, 43 Miss. 238; *New Orleans J. G. N. R. Co.*, 46 Miss. 573; *Baltimore & Ohio R. Co. v. Mulligan*, 45 Md. 86; *Brown v. New York Central R. Co.*, 34 N. Y. 404; *Prior v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215; *Parker v. Dubuque & S. W. R. Co.*, 34 Iowa, 399; *Missouri Pac. R. Co. v. Reynolds*, 13 Am. & Eng. R. R. Cas. 510.

**Cattle near the Track.**—A railroad company is not under any circumstances obliged to stop its train because cattle are ahead near the track. *Edson v. Central R. Co.*, 40 Iowa, 47; *Peoria, etc., R. Co. v. Champ*, 75 Ill. 557; *Louisville & N. R. Co. v. Ganote*, 13 Am. & Eng. R. R. Cas. 519. But see *Aylock v. Wilmington & W. R. Co.*, 6 Jones (N. C.), 231.

**Unavoidable Accident.**—When cattle come suddenly on the track and there is no time to stop the train before it strikes them, the company is not liable. *Louisville & N. R. Co. v. Wainscott*, 3 Bush. (Ky.) 149; *Illinois Central R. Co. v. Wren*, 48 Ill. 77; *Chicago, B. & Q. R. Co. v. Bradfield*, 68 Ill. 220; *Holder v. Chicago, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 567; *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150; s. c., *supra*; *Little Rock & Ft. S. R. Co. v. Turner, Adm'r.*, 41 Ark. 161; s. c., *supra*.

**Increasing Speed of Train—When Allowable.**—In case the course seems likely to prove the safest for the train and its contents, the engineer is justified in increasing the speed so as to throw the cattle from the track. *Owens v. Hannibal, etc., R. Co.*, 58 Mo. 387; *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Louisville, etc., R. Co. v. Milton*, 14 B. Monr. 75; *Louisville, etc., R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Chicago, St. L. & N. O. R. Co. v. Jones*, 11 Am. & Eng. R. R. Cas. 450.

## MEMPHIS AND LITTLE ROCK R. R. as reorganized

v.

SANDERS et al.

(48 Arkansas Reports, 225.)

To excuse a railroad company for negligence in killing stock wrongfully upon its track, it must appear that there was no negligence of the engineer in keeping watch or in observing signals of danger, and that reasonable care was exercised to avoid the collision after the danger was discovered.

APPEAL from Lonoke Circuit Court.

Geo. Sibley for appellant.

Jno. C. and C. W. England for appellees.

**EAKIN, J.**—Appellees sued the Railroad Company below for damages, on account of injury to a horse done by a running train. The defendant denied the alleged injuries, and set up also contrib-

utory negligence on the part of the plaintiffs. Upon trial a jury returned a verdict in favor of plaintiffs for \$90 damages. After a motion for a new trial had been overruled, and a bill of exceptions allowed, the defendant appealed.

The first five grounds of the motion are all to the effect that the verdict is contrary to the evidence, or not sustained by it. There was proof tending to show that upon a dark night a person to whom plaintiffs had hired the horse was riding him along a dirt road near the track, but not there crossing it. The road was overflowed with water from one to three feet deep. The railroad crossed the low ground upon an embankment several feet above the water, having overflowed ditches on both sides. The rider stopped to let his horse drink, being at the time in view of the headlight of an approaching train, which was yet a great distance off. The horse whilst drinking scared at some object and started. Before the rider could gather up the slack of the reins and control him, the horse ran up the embankment, and along the track to a culvert, at which he fell, throwing the rider over his head. The rider rose, and first endeavored to get the horse off the track, but finding that impossible, he ran towards the approaching train, waving his hand and cap, and calling out to stop it, until the engine came so near that he jumped off the track to avoid it. The engineer first saw the man on the track waving his hand, but paid no attention to the warning. When the man jumped off he could see the horse by the light of his headlight, and he then made every reasonable effort, by the aid of the fireman, to stop the train. It was too late. The horse was pushed from the track and badly injured. Damages were proved.

The jury might, upon this, find some negligence, unqualified by any proof of contributory negligence. The engineer says that he did not heed the warning, because it is customary for persons to get upon the track, and jump off just as the engine comes up. It was for the jury to say whether or not that sort of annoyance fairly excused the engineer from disregarding the only warning of danger which, under the circumstances, it was possible to give. The company, through him, took the responsibility of doing so. Fortunately, in this case, the only injury was damages to an animal. It might, for aught the engineer could know, have involved the death of a human being lying helpless on the track, or, far worse, the wreck of the train in a broken culvert, and the death of the persons on board. For if the engineer could not see the horse in time to stop the train, he could not have discovered the damaged condition of the culvert if it had been broken. Considering the time, place, and circumstances, the darkness of the night, the long elevated embankment, the water floods upon each side, which would deter animals from leaving the track, we can easily understand that his conduct might impress the jury as somewhat reckless. The ver-

dict finds ample support in the proof. As to contributory negligence it may be as well to say, once for all, that there is not a particle of proof of it in the whole transcript.

It is true enough, in one sense, that railroad trains have a right to a clear and unobstructed way along their tracks. No one may obstruct these without a trespass and a wrong, unless it be done accidentally or unavoidably. Still this right must be exercised reasonably, with a fair consideration of the rights of others, and with reference to the circumstances of the country. The servants and agents of the companies for whose acts they are responsible have not the right wantonly, recklessly, or even carelessly, to destroy whatever they may find in their way. Roads are useful to citizens, but the right to a fair and reasonable protection of property is useful to them also, not to be overbalanced by the inconvenience of a slight delay of a train, to say nothing of the far higher consideration—the lives and limbs of human beings on the train, whether brakemen or passengers.

The instructions have been very carefully given and refused by the Hon. Circuit Judge. His rulings have been in accordance with the views of this court previously expressed, or necessarily implied. Only one has met with serious objection on the part of appellant's counsel.

The eighth instruction given for the defendant was, that "if the property of plaintiffs was wrongfully on the defendant's track, as the defendant was entitled to a free and unobstructed track, as against the plaintiffs, it is only for negligence of the defendant after being apprised of the situation of plaintiff's property, that defendant is chargeable." This is correct upon the hypothesis that there was no previous negligence in keeping watch, or disregarding signals of danger. It was perhaps too favorable for defendant as given. The defendant by counsel insisted, however, that his Honor should add, that "it is only for culpable and gross negligence of defendant, after being apprised of the situation of plaintiff's property, that defendant is chargeable." This was properly refused. It is not sufficient to exercise a slight degree of care and attention, the omission of which would constitute gross negligence, to excuse one from inflicting damage to which the injured party has contributed. After the discovery of a danger, brought about by the negligence of another, one must in all cases use a reasonable diligence to avoid the consequences, and, where human life is involved, to be reasonable it must be everything that humanity would prompt, and which might be reasonably thought of in the emergency. In ordinary cases like this, involving property, it must be ordinary care. Such care as a prudent man, of average careful habits, would be prompted to use to avert an injury to property of his own. Gross negligence implies only absence of slight care. The degree of care should be proportional



to the pending danger to be apprehended. To have given the instructions as asked might have been misleading. *L. R. & Ft. Smith R. R. Co. v. Finley*, 37 Ark., 562; *Citizens St. Ry. v. Steem*, 42 Ib. 321; *L. R. & Ft. Sm. R. R. v. Turner*, 41 Ib. 161; s. c., *supra*.

We find no reversible error.

Affirmed.

**Servants bound to Use Ordinary Care to Prevent Injury to Cattle on Track.**—The servants of a railroad company are bound to use all ordinary and reasonable care to prevent injuries to live-stock upon the track. *Quimby v. Vermont, etc., R. Co.*, 23 Vt. 387; *Proctor v. Wilmington, etc., R. Co.*, 72 N. C. 579; *Trout v. Virginia, etc., R. Co.*, 23 Gratt. 619; *Coyle v. Baltimore, etc., R. Co.*, 11 W. Va. 94; *Mississippi, etc., R. Co. v. Miller*, 40 Miss. 45; *Illinois, etc., R. Co. v. Wren*, 43 Ill. 77; *Great Western R. Co. v. Geddis*, 33 Ill. 804; *Burton v. Phila., etc., R. R. Co.*, 4 Harr. (Del.) 252; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; s. c., 11 Am. & Eng. R. R. Cas. 469.

**Duty of Engineer to Slacken Speed when Cattle are ahead on Track.**—Upon this subject see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *supra*.

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## UNION PACIFIC R. Co.

v.

SHANNON.

(*Advance Case, Kansas. April 10, 1885.*)

In an action to recover damages for the killing of cattle at a railroad crossing, the engineer testified that as soon as he saw the cattle on the track he put on the air-brakes and reversed the engine, stopping the train within 800 yards, which, he testified, was the quickest a train of the kind going at the rate of speed at which his train was going could be stopped. The jury found for the plaintiff, and as a special finding of fact that the train could have been stopped within 850 or 875 feet. There was no evidence to support this finding. *Held* that the jury had no right so to find and that a new trial would be ordered.

ERROR from Leavenworth County.

J. P. Usher and Charles Monroe for plaintiff in error.

Lucien Baker for defendant in error.

HORTON, C. J.—This was an action brought by the defendant in error (plaintiff below) against the railway company to recover the sum of \$176, being the value of seven head of cattle alleged to have been wrongfully and negligently killed by the railway company at the crossing of a public road. The jury found a verdict for the plaintiff below, and also returned special findings of fact. Among the special findings of fact were the following:

“Did the engineer of the train blow the whistle of the locomotive eighty rods west of the crossing where plaintiff's cattle were struck on the occasion of the injury? *Answer.* No.” “As soon as the engineer saw the cattle, did he apply the air-brakes on his engine, and reverse the engine? *A.* No.” “What is the shortest distance in which this engine could have been stopped at the speed it was going at the time of the injury? *A.* 350 to 375 feet.”

The evidence upon the question whether the whistle was sounded 80 rods west of the crossing where the cattle were struck, was conflicting. The engineer testified, among other things, “as soon as he saw the stock, he immediately put on the air-brakes and reversed the engine, and stopped in about 300 yards.” We do not find in the record any evidence conflicting with this. The engineer also testified “that the speed of the train was forty-five miles an hour; that he stopped the train in about 300 yards; that this was the quickest a train of that kind, going at the speed it was, could be stopped.” There was no testimony contradicting this statement, and no other witness testified within what space an engine could be stopped going at the speed this engine was. The jury therefore not only disregarded the testimony of the engineer concerning the distance in which he might have stopped the engine, but made the finding that the engine could have been stopped in from 350 to 375 feet, without any evidence whatever. This they had no right to do. As this finding, which was important as tending to establish negligence on the part of the railway company, was made without evidence, it affects all the findings, as it goes to show that the jury were determined to make the findings, regardless of the evidence, so as to sustain a general verdict against the railway company. It also affects the general verdict, because if important special findings of fact are made by a jury without the support of evidence, it cannot be said that their general verdict, upon conflicting evidence, is entitled to much confidence. Counsel for plaintiff below suggests, however, that the jury “had the right to apply their own common-sense and knowledge to the matter,” and therefore they had the right to say, of their own knowledge, “that the engine could have been stopped within 350 or 375 feet.”

It was decided in *Missouri R. R. Co. v. Richards*, 8 Kan. 101, that “the jury are always in a case to use the knowledge and experience they are supposed to possess in common with the generality of mankind, in making up a verdict. And it was further decided in *Anthony v. Stinson*, 4 Kan. 211, that “the jury cannot be required by the court to accept as matter of law the conclusions of witnesses.” These decisions are not controlling in this case. It is not within the general knowledge of persons in what space an engine or train can be stopped, going at the speed of 45 miles an hour, and equipped with the appliances as the one operated by the

company at the time of the accident. To determine how long it takes to stop an engine or train requires experience in the running of trains and in checking their speed, or opportunities on the part of a person giving opinion thereof to speak as an expert. *Manhattan, A. & B. R. Co. v. Stewart*, 30 Kan. 226; s. c., Pac. Rep. 151. This was not a subject upon which the jury could use their own judgment; and if any one of the jury had any particular knowledge on the subject, he ought to have been sworn and examined as a witness. *Railroad Co. v. Van Steinberg*, 17 Mich. 105; *Rex v. Rosser*, 7 Car. & P. 648, 803; s. c., 32 E. C. L. 803; *Railroad Co. v. Richards*, *supra*.

The complaint is not that the jury disregarded the opinion and statement of the engineer, in the finding, within what space an engine could be stopped, but it is that the jury not only ignored such testimony, but made their finding without any evidence to support it.

The judgment of the district court will be reversed, and the cause remanded for a new trial.

All the justices concurring.

**Slackening Speed when Cattle on Track.**—As to the duty of an engineer to slacken speed when he perceives cattle ahead upon the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *supra*.

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**ALABAMA GREAT SOUTHERN R. R. Co.**

*v.*

**POWERS.**

(78 *Alabama Reports*, 244.)

In an action against a railroad company to recover damages for injuries done to a horse, a charge, given at the request of the plaintiff, instructing the jury that, if the horse was seen by the engineer within ten or fifteen feet of the road, or running close by the road-bed, on a line with it, and within a few feet of the moving train, and under circumstances indicating danger of the horse's getting on the track, it was the duty of the engineer to use all means in his power to frighten the horse away, until the danger had ceased, asserts a correct legal proposition.

In such case, a charge given at the request of the plaintiff is free from error, which instructs the jury that the reason why different rules for railroads are prescribed for the preservation of cattle, and for the safety of human life, is, that human beings are sentient, and cattle do not know the necessity of leaving the track; and that as to cattle, in addition to sounding the alarm whistle, the brakes must be applied, and the train checked or stopped, if need be, to prevent injury.

The diligence required of an engineer in charge of a locomotive, in order to avoid injury to stock, does not commence at the moment he first perceives

the stock on the track; and a charge requested by a railroad company, in an action against it to recover damages for injuries to stock, limiting the engineer's duty to the employment of all proper means to avoid the injury from that moment, is properly refused.

That the verdict of the jury trying a cause is not sustained by the evidence is a wrong which this court has no power to redress; the only remedy therefor being a motion for a new trial in the primary court.

The fact that the owner of stock permits them to run at large, and to trespass on the track of a railroad company, does not preclude him from recovering for injuries done to the stock by the company's locomotive and train.

#### APPEAL from Hale Circuit Court.

This suit was brought by John S. Powers against the Alabama Great Southern R. R. Co., a corporation operating a railroad in this State, to recover damages for injuries alleged to have been done to plaintiff's horse by the defendant's locomotive and train, through and by reason of the negligence of defendant's servants in conducting and running said locomotive and train. The cause was tried on issue joined on the plea of not guilty, the trial resulting in a verdict and judgment for the plaintiff.

The evidence introduced on behalf of the plaintiff tended to show, that on 29th of April, 1882, the plaintiff's horse, having been turned into a common pasture owned by the plaintiff and one Prince, in a district in which crops are required to be fenced, and it was customary to allow stock to run at large, was grazing in an old field through which the road ran, within fifteen or twenty feet of defendant's track, when the train approached, and the horse started towards the track, approaching it diagonally, and attempted to cross it, and was run over and so injured by defendant's locomotive that he had to be killed; and that only "one whistle was heard, which was sounded just as the horse was struck." The value of the horse was also shown. The evidence introduced on behalf of the defendant tended to show that the defendant's track at and near the place where the horse was injured was perfectly straight, and the train was running at the rate of from five to seven miles per hour; that while the engineer was in his seat on the right-hand side of the engine, three horses were perceived by him about ten yards from, and on the right-hand side of the road, about forty yards distant from the engine; that the horses appeared to have been frightened by the train, and two of them ran off from the road, but the third started diagonally towards the road; that as soon as it was seen coming towards the road, "the engineer whistled down brakes, and immediately thereafter sounded the stock alarm several times; that the horse came up the embankment, which was about three feet high, to the track, as if to cross, about fifteen yards in front of the engine; that the engine was reversed, and every effort made to stop the train;" that the train was stopped just after the horse was struck; and that the en-

gineer and other employees in charge of the train were experienced, skilful, and careful men in their line of employment, and that the engine, cars, brakes, and appliances were in good order and condition. The foregoing is the substance of the material portions of the evidence introduced, as shown by the bill of exceptions.

The court charged the jury, at the written request of the plaintiff, as follows: 1. "If the horse was seen by the engineer within ten or fifteen feet of the road, or running close by the road-bed, on a line with it, and within a few feet of the road and train, as it was moving, and under circumstances indicating danger of its getting on the track, then it was the duty of the engineer to use all means in his power to frighten away the horse, until the danger had ceased." 2. "Human beings are sentient, and have the reasoning faculty; and this is the reason why different rules for railroads are prescribed for the preservation of cattle, and for the safety of human life. As to the former, in addition to sounding the alarm whistle, the brakes must be applied, and the train checked or stopped, if need be, to prevent injury; for domestic animals know not the necessity of leaving the track." The defendant duly reserved exceptions to the giving of these charges, and also to the refusal of the court to give the following charges, requested by it in writing: 1. "If the jury believe from the evidence that the engineer and persons in charge of said train were very careful and prudent men, and that, on perceiving the said stock on the railroad, used that degree of diligence which every careful and prudent man exercises in the conduct of his own affairs, in seeking to avoid the danger and arrest the injury to said stock, then they must find for the defendant." 2. "If the jury believe from the evidence, that the engineer on said defendant's train was on the look-out for obstructions, and that, when he discovered said stock on the track, he and the persons in charge of said train promptly resorted to all means known to skilful engineers to escape the impending danger, or arrest the threatened injury, then the defendant exercised that due diligence which the law requires of the defendant in this case, and the jury must so find."

The charges given at the plaintiff's request, and the refusal of the court to charge as requested by the defendant, are here assigned as error.

Samuel F. Rice, Wood & Wood and Coleman & Roulhac for appellant.

Thomas Seay, *contra*.

STONE, J.—1. The circuit court did not err in giving the two charges requested by appellee. They each assert correct principles of law. *M. & M. R. Co. v. Blakely*, 59 Ala. 471; *L. & N. R. R. Co. v. Jones*, 56 Ala. 507. And though, it is possible, they are

abstract, and have a tendency to mislead, yet this furnishes no ground for reversing the judgment. The appellant should have requested explanatory charges "by which the objectionable tendency could have been averted and healed." *McCrary v. Rash*, 60 Ala. 374; *Smith v. Fellows*, 58 Ala. 467; *Durr v. Jackson*, 59 Ala. 203.

2. Charges numbered 1 and 2, requested by the appellant, and refused by the court, were properly refused. They each confine the diligence to be exercised by the persons in charge of the train, for the purpose of avoiding the danger, and arresting the injury to the horse, to the time when the engineer perceived it on the track. If this were the correct rule, the persons in charge of the train need have exercised no diligence, but may have conducted the train in a negligent manner up to the time of perceiving the horse on the track. As was said by this court in the case of *S. & N. R. R. Co. v. Jones*, 56 Ala. 507: "The engineer, if he saw the ox in dangerous proximity to the track, and under circumstances indicating danger of its getting on the track, should have taken steps promptly to frighten him away; or, if need be, should have arrested the motion of his train, if possible, rather than incur the hazard of destroying another's property."

We find no error in the record, and the judgment is affirmed.

On a subsequent day of the term an application was made by the appellant for a rehearing, to which the following response was made:

STONE, J.—We are not able to find any errors in the rulings of the court, of which appellant can complain. If it be true that the verdict of the jury was unsustained by the testimony, that is a wrong which we have no power to redress. The presiding judge in the primary court alone had power to grant a new trial, and that is the only method known to our system, by which to obtain relief from a verdict, unsupported by testimony. And from his ruling, on such motion, no appeal lies to this court. The theory of our system is, that juries, as their oaths require them to do, will fairly and impartially weigh the testimony, and that their verdict shall truly represent the convictions produced on their minds by the evidence, construed in reference to the law, as given them in charge by the court. If a verdict be rendered on any other principle than this, it is done in palpable disregard of a solemn oath; and there is no more sacred duty resting on the presiding judge, than to set aside a verdict which is rendered in palpable disregard of the evidence, or of the charge of the court.

Cases may be found, in which it was held that when the owner of the animal killed permitted it to run at large, and trespass on the track of the railroad, he thereby precluded himself from recovering for the injury done. But in all those cases, the statutes



of the States in which the rulings were made, required stock to be kept within inclosure, and not allowed to run at large. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349; *Jackson v. R. & B. R. R. Co.*, 25 Vt. 150; *P. C. & St. L. Ry. Co. v. Stuart*, 71 Ind. 500; *Price v. N. J. R. R. & T. Co.*, 31 N. J. (Law) 229; s. c., 32 Ib. 19. We have ruled differently. *S. & N. R. R. Co. v. Williams*, 65 Ala. 74; *Ala. Gt. Southern R. R. Co. v. McAlpine*, 71 Ala. 545; s. c., 15 Am. & Eng. R. R. Cas. 544.

The application for a rehearing must be denied.

**Duty to Give Signals when Cattle on Track.**—As to the duty of the engineer of a railroad train to give suitable signals to frighten cattle off the track, see *Kansas City, St. J. & C. B. R. Co. v. Turner*, and note, *infra*.

**Cattle Trespassing on Track.**—As to the duty of a railroad company to cattle trespassing on the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *supra*.

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## KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. Co.

v.

TURNER.

(78 Missouri Reports, 578.)

The circuit court, on appeal from a justice, may allow the constable to amend his return on the summons, according to the fact, so as to show proper service on the defendant.

Section 38 of the Railroad Law of Missouri does not require both the ringing of the bell and the sounding of the whistle when a train approaches a public crossing. Either will suffice.

It is no defence to an action under section 38 for killing stock, that the plaintiff allowed his animals to run at large upon the highway near the railroad.

If the company fails to give the signal required by section 38, and stock is killed or injured, which is in such a condition or situation that if the signal had been given it might have escaped, this constitutes a *prima facie* case against the company.

APPEAL from Platte Circuit Court.

Strong & Mosman for appellant.

R. P. C. Wilson for respondent.

HENRY, J.—This suit originated in a justice's court in Platte County, and is for damages for killing plaintiff's stock by a train of cars passing over defendant's road, in consequence, it is alleged, of a failure to ring the bell or sound the whistle, in violation of section 38, article 2, Wagner's Statutes, volume 1, page 310.

On a motion in the circuit court to which the cause was appealed, to quash the return of the constable on the writ of summons, and

dismiss the suit, the court allowed that officer to amend his return, and overruled the motion. The constable's original return was imperfect and defective, but might have been amended in the justice's court, and we think that when the circuit court became possessed of the cause it also could allow the amendment. The justice had jurisdiction of the cause, if the writ was in fact properly served upon defendant, whether the return of service made by the officer was defective or not. The service in this case was sufficient, and the return only was defective in not stating correctly the manner of service, and no error was committed by the circuit court in permitting the amendment.

The evidence proved the killing of the stock by defendant's train of cars, but whether the bell was rung or the whistle was sounded as required by the statute, was not so clear from the evidence. The court, for plaintiff, gave to the jury the following instruction:

If the jury believe the horses and colt in question were injured and killed in the public road or highway where the defendant's track crosses it in Lee Township, Platte County, Missouri, on or about the 6th day of July, 1879, by the locomotive and cars of the defendant, and that defendant failed to sound a whistle on said locomotive eighty rods from the crossing of said public highway and continue to sound the same at intervals until said highway was passed by the train, or failed to ring a bell within said eighty rods and continue ringing the same until the railroad train crossed said road or highway, they will find for the plaintiff; provided, they further believe that the failure as aforesaid to sound the whistle and ring the bell caused the injury complained of.

The instruction is manifestly erroneous. The statute does not require both the blowing of the whistle and ringing of the bell. Either is sufficient, and yet the instruction is predicated upon a supposed legal duty to do both. By it the jury were told that if defendant failed to blow the whistle, or failed to ring the bell, and if the injury to the stock was caused by such failure to sound whistle and ring the bell, plaintiff was entitled to recover. The instruction should have been to the effect that if defendant neither sounded the whistle, nor rang the bell, etc., and if the injury was occasioned by such neglect, plaintiff was entitled to a verdict. *Van Note v. Hannibal & St. Joseph R. R. Co.*, 70 Mo. 641.

Counsel for appellant contend that the 38th section imposes no duty upon defendant to plaintiff as to stock which he allowed to stray upon the highway in the vicinity of the track. It is well settled in this State that the owner of cattle is guilty of no negligence in permitting his stock to run at large, whether in the vicinity of a railroad track or remote from one; and the statute was passed in order to require the railroad companies to use proper precautions to avoid injuring or killing stock which might be on or near railroad crossings of public roads. In its wisdom the legislature deter-

mined that ringing the locomotive bell, or sounding the whistle, would tend to prevent the injury of stock at such crossings.

Counsel argue from the evidence of experts that neither ringing the bell nor sounding the whistle is apt to frighten stock from the track, but that on the contrary, if near the track, they are as likely to run upon the track of the road as away from it, when frightened by whistle or bell. This may be, but it is a matter for the consideration of the legislature. Section 38 may be an unwise provision, so far as applicable to stock, but this court is not, therefore, authorized to eliminate it from the statutes. The duty imposed by section 38 is not a very onerous one, and if by complying with that section cattle near the track are frightened and run on the track, or cattle on the track are not frightened off, and are injured, the company incurs no liability under that section, and, therefore, the better course—the only safe course for the company—is to observe the requirements of the statute. When the stock killed or injured at a crossing are in a condition and situation to escape, if the required signal is given, a *prima facie* case is made against the company, if it has failed to give such signal. This has been repeatedly held by this court, and recently in two cases. *Goodwin v. R. R. Co.*, 75 Mo. 75; *Alexander v. R. R. Co.*, 76 Mo. 494.

For the error contained in the plaintiff's instruction, the judgment is reversed and the cause remanded. All concur.

**Duty to Give Signals when Cattle on Track.**—When there is no statute directly applicable, a failure to give signals which would warn cattle to get off the track in time to escape being run over is not negligence, but is evidence of negligence. *Michigan S. & N. I. R. Co. v. Fisher*, 27 Ind. 96; *Illinois, etc., R. Co. v. Phelps*, 29 Ill. 447; *Illinois, etc., R. Co. v. Goodwin*, 30 Ill. 117; *Toledo, etc., R. Co. v. Fergusson*, 42 Ill. 449; *Indianapolis, etc., R. Co. v. Hamilton*, 44 Ind. 76; *Flattes v. Chicago, R. I. & P. R. Co.*, 35 Iowa, 191; *Searles v. Milwaukee, etc., R. Co.*, 35 Iowa, 490; *Plaster v. Illinois Central R. Co.*, 35 Iowa, 449; *Jackson v. Chicago & N. W. R. Co.*, 36 Iowa, 451; *Gates v. Burlington, etc., R. Co.*, 39 Iowa, 45; *Tabor v. Missouri Valley R. Co.*, 46 Mo. 354; *Owens v. Hannibal, etc., R. Co.*, 58 Mo. 387; *Barnes v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Washington v. B. & O. R. Co.*, 10 Am. & Eng. R. R. Cas. 749; *Missouri Pac. R. Co. v. Wilson*, 11 Am. & Eng. R. R. Cas. 447; *Alabama Gt. Southern R. Co. v. Powers*, 73 Ala. 244; s. c. *supra*.

**Statutory Signals.**—When there is a statute requiring the giving of signals the company will of course be liable when an injury occurs to cattle in consequence of the failure to give the signals. *Howenstein v. Pacific R. Co.*, 55 Mo. 33; *Owens v. Hannibal & St. Jo R. Co.*, 58 Mo. 386; *East Tenn., Va & Ga. R. Co. v. Scales*, 2 Lea (Tenn.), 688; *Chicago & R. I. R. Co. v. Reid*, 24 Ill. 144; *Great Western R. Co. v. Geddis*, 33 Ill. 304; *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449; *Springfield & I. S. R. Co. v. Andrews*, 68 Ill. 56; *Mobile, etc., R. Co. v. Malone*, 46 Ala. 391; *Braxton v. Hannibal & St. Jo R. Co.*, 13 Am. & Eng. R. R. Cas. 494; *Alabama Great S. R. Co. v. McAlpine & Co.*, 15 Am. & Eng. R. R. Cas. 544.

**Presumption of Negligence.**—In some States where there are such statutory provisions as above it is held that proof of the occurrence of the accident coupled with proof of the failure of the parties in charge of the engine to give any signal constitutes a *prima facie* presumption of negligence. *Central*

Branch R. Co. v. Phillipi, 20 Kans. 9; Mobile, etc., R. Co. v. Williams, 58 Ala. 595; Mobile, etc., R. Co. v. Malone, 46 Ala. 391; Nashville, etc., R. Co. v. Thomas, 5 Heisk. (Tenn.) 262; Memphis, etc., R. Co. v. Smith, 9 Heisk. (Tenn.) 860; Howenstein v. Pacific R. Co., 55 Mo. 38; Owens v. Hannibal, etc., R. Co., 58 Mo. 387.

**Casual Connection.**—In other States it is held, however, that the plaintiff must go further and show the casual connection between the failure to give the signal and the injury to the cattle. Illinois Central R. Co. v. Phelps, 29 Ill. 447; Illinois Central R. Co. v. Goodwin, 80 Ill. 117; Great Western R. Co. v. Geddis, 33 Ill. 304; Indianapolis, etc., R. Co. v. Blackman, 63 Ill. 117; Chicago, etc., R. Co. v. McDaniels, 63 Ill. 122; Chicago, etc., R. Co. v. Henderson, 66 Ill. 494; Rockford, etc., R. Co. v. Linn, 67 Ill. 109; Quincy, etc., R. Co. v. Wellhoener, 72 Ill. 60; Stoneman v. Atlantic & P. R. Co., 58 Mo. 503; Helman v. Chicago, R. I. & P. R. Co., 62 Mo. 562; Atchison, T. & S. F. R. Co. v. Morgan, 13 Am. & Eng. R. R. Cas. 499.

**Signals Frightening Cattle.**—Even when the probable effect will be to frighten cattle and cause them to run upon the track, it is not negligence to give a statutory signal. Manhattan, etc., R. Co. v. Stewart, 13 Am. & Eng. R. R. Cas. 503.

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## LOUISVILLE AND NASHVILLE R. R. Co.

v.

MARRIOTT.

(*Advance Case, Kentucky. May 14, 1884.*)

In an action for killing cattle when the servants of the railroad company were called to rebut the statutory presumption of negligence, they must, under the peculiar circumstances of this case, be presumed to have known the facts.

In an action such as the above the mere fact that the train was moving at a speed greater than was customary, though not in excess of the speed allowed by statute and the rules of the company, was not evidence of negligence.

Where the engineer of a passenger train sees cattle upon the track in advance, he is only bound to stop the train when he can do so with due regard to the safety of his passengers. In this case there was no evidence that the engineer ought to have stopped the train under the rule stated above.

Evidence as to the space within which witnesses had observed certain trains stopped is not admissible where the witnesses are unable to state the speed of the trains at the time they are stopped.

**THE COURT.**—This is an appeal from a judgment against a railroad company for killing the cattle of appellee. The injury and amount of damage being admitted, the burden was on the appellant to rebut the statutory presumption of negligence.

This the company did by the introduction of those employees who, under the peculiar circumstances of the case, must be presumed to know the facts. Ky. Central R. R. Co. v. Talbot, 78 Ky. 621. Unless they were contradicted either by other witnesses or by the circumstances attending the accident, the plaintiff was

**510 LOUISVILLE AND NASHVILLE R. R. CO. v. MARRIOTT.**

not entitled to recover. The judgment was based upon a special verdict. The plaintiff attempted to prove two facts in support of his charge of negligence: first, that the train was being run at too great a rate of speed; second, that the stock could have been saved by stopping or checking up the train after they were seen or could have been seen by the employees of the defendant.

Upon the first ground the jury found that "the train was running at a rate greater than is usual," and that this was not "rendered necessary by any unavoidable accident or delay," but that this increased speed "conduced to the killing of the cattle." These facts were not sufficient to establish negligence. As to what was the usual speed is not shown, and it is certainly not wrong for the officers of a train to run it at times faster than customary. It is often the duty of such officers to increase the speed, and their right to do so is not dependent upon "unavoidable accident or delay." This case is not similar to *McLeod v. Ginther*, 78 Ky. 408. There it was proven that the train was run at a greater rate of speed than was authorized by the rules of the company, and that was held to be evidence of negligence. But here there was no attempt to show that the rules of the company were violated, or that any other duty was transgressed by reason of the speed. Of course, running a train fast "conduces" to the injury of any stock that may be on the track; but because this is true, the company is not bound to run its trains slow, or as slow as "usual." Moreover, the above answers must be read in connection with the answer to the 6th question. In the latter the jury find that, at the time the cattle were killed, the defendant's employees were doing nothing they ought not to have done. This is, in substance, finding that although they were running the train faster than usual, still they were doing nothing it was not their right and duty to do. The verdict was, therefore, against the plaintiff on the first ground.

Was there negligence in failing to stop or check the train?

"In considering the question of negligence of the agents of a railroad company all their duties must be considered; their first and higher duties to the passengers and property in their charge, and their subordinate duties to avoid injury to live-stock straying on the road in front of them." *Ky. Cent. R. R. Co. v. Lebus*, 14 Bush. 523. It was, therefore, not simply a question of whether the train could have been stopped in time to save the stock, but whether it could have been so stopped without the obligation its officers were under for the protection of the lives and property under their charge.

The jury has found that the cattle could only have been seen a distance of two hundred yards, and that the train could not have been stopped "with safety to it and its passengers and employees" in a shorter distance than four hundred yards. If the cattle had remained at the point where first seen, or where they could have

been first seen, the accident would have been unavoidable, but the jury find in answer to the 12th question that they were killed four hundred yards from this point; in other words, that the train ran six hundred yards after it first came in sight of the cattle before they were killed. By this finding, the cattle must have run four hundred yards, while the train ran six hundred; that is, the speed of the cattle was two thirds that of the train. But they further find that the train was running at the rate of fifty miles an hour, "just before and at the time it struck plaintiff's cattle." The cattle must, therefore, have run the four hundred yards at the rate of thirty-three and one third miles an hour. We are of the opinion that there was nothing in the evidence to justify the jury in finding that they were capable of such extraordinary speed. Nor was there any evidence to justify the finding that the train could have been stopped in four hundred yards. There was no competent testimony but what fixed it at more than six hundred yards. The jury must have taken into consideration the statements of Peter Kelly and James Crally. One of them said he had seen trains stopped at depots in a distance of 500 feet, and the other said he had seen two trains, when meeting each other, stopped in 300 yards. But neither of them knew at about what speed the trains were going. Without this information their testimony was not only incompetent, but was worthless, for the distance within which a train can be stopped must depend more upon its velocity than upon anything else. The jury were evidently misled by this testimony, and the court erred in admitting it.

For these reasons the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

**Speed of Train—Duty as to Cattle.**—In an action for killing cattle, the running of a train at a very high rate of speed, provided the rate is not in excess of what is allowed by law or by the regulations of the company, is not of itself evidence of negligence. *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Toledo, etc., R. Co. v. Barlow*, 71 Ill. 640; *Edson v. Central R. Co.*, 40 Iowa, 47; *McKonkey v. Chicago, etc., R. Co.*, 40 Iowa, 205; *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 574; *Burton v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 252; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 67; *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150; s. c., *supra*.

In certain cases, however, a high rate of speed coupled with other circumstances has been held evidence of negligence which should go to a jury. *Indianapolis, etc., R. Co. v. Hamilton*, 44 Ind. 76; *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397; *Burton v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 252; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Railroad Co. v. Lyon*, 7 Rep. 226; *Pacific R. Co. v. Houts*, 12 Kans. 328; *Latty v. Burlington, etc., R. Co.*, 38 Iowa, 250; *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. R. Cas. 460.

**Duty to Slacken Speed when Cattle are on Track.**—When an engineer perceives cattle ahead upon the track, it is only his duty to stop when he can do so having due regard to the lives and safety of the passengers and freight under his charge. *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Maynard v.*



Boston, etc., R. Co., 115 Mass. 458; McDonnell v. Pittsfield, etc., R. Co., 115 Mass. 564; Darling v. Boston, etc., R. Co., 121 Mass. 118; Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; Smith v. Chicago, etc., R. Co., 34 Iowa, 506; Chicago, St. L. & N. O. R. R. Co. v. Jones, 11 Am. & Eng. R. R. Cas. 450; Little Rock & Ft. Smith R. Co. v. Finley, 11 Am. & Eng. R. R. Cas. 469; Little Rock & Ft. Smith R. Co. v. Trotter, 11 Am. & Eng. R. R. Cas. 475; Missouri Pac. R. Co. v. Reynolds, 13 Am. & Eng. R. R. Cas. 510; Louisville & N. R. Co. v. Ganote, 13 Am. & Eng. R. R. Cas. 519; Chicago, R. I. & P. R. Co. v. Kendig, 79 Mo. 207; s. c., *supra*; Kansas City, Ft. S. & G. R. Co. v. Hines, and note, *supra*.

## HANNIBAL AND ST. JOSEPH R. R. Co.

v.

YOUNG.

(79 Missouri Reports, 386.)

Proof of actual negligence on the part of the company is not necessary in order to authorize recovery for live-stock killed on a railroad track within the corporate limits of a city, if the place be one where the company might have fenced but did not.

As matter of law, no rate of speed at which a train may run constitutes negligence *per se*.

If the engineer in charge of a train, after discovering live-stock on or near the track in danger, fails to use proper effort to avoid injuring them, the company will be liable for any injury done.

If an engineer in charge of a train on an unfenced road sees live stock grazing quietly near the track, he is not bound to stop the train or take other precaution against collision; and if they take fright and run upon the track, it is sufficient if he does all he can to avoid collision after he becomes apprised of their danger.

APPEAL from Marion Circuit Court.

Geo. W. Easley for appellant.

Thos. L. Anderson for respondent.

PHILLIPS, C.—This is an action for damages for killing the respondent's horse in the city of Palmyra, Missouri, through the alleged negligence of defendant's servants and employees in running and managing one of its freight trains.

The evidence on plaintiff's behalf tended to prove that the town of Palmyra is an incorporated city; that plaintiff's horse was grazing beside the track of the railroad, about eighteen or twenty feet distant; that the engineer could have easily seen the horse when approaching with his train from three to five hundred feet off; that just beyond where the horse was grazing—some ninety feet—there was a public road crossing over the railroad track. On approaching this crossing the engineer gave the usual road-crossing

signal. On approaching, the horse ran down the ditch alongside the track, which ditch was three or five feet deep. The horse ran toward the road-crossing which was his point of egress from the ditch. There was no apparent effort on the part of the engineer to check the speed of the train, which was running from ten to fourteen miles an hour, until the horse reached the crossing and attempted to cross the track where he was killed.

Defendant's evidence, through its engineer, was to the effect that the engineer had frequently seen this horse grazing at or about this point, and that he never knew him before to run alongside the track at the approach of the train and attempt to cross the track; that he first saw the horse on the occasion of the injury about 300 feet off, as he approached with a freight train; that the horse remained grazing until he ran within thirty feet of him, when he ran as described; that he instantly gave the signal for applying the brakes, which was done; and that he reversed the engine and used every effort to avert the disaster; that owing to the character of grade at the point, he was under the necessity to run at the rate of speed stated; that he made no effort to check the train when he first saw the horse because he apprehended no danger until his movement to cross the track.

On behalf of plaintiff the court declared the law to be: "If the jury believe from all the facts and circumstances proved in evidence, that the defendant, its servants and agents, could, by the use of reasonable care and diligence, have avoided injuring plaintiff's horse, it ought to find a verdict for plaintiff."

On its own motion the court gave the following instructions:

1. It was the duty of the employees of the defendant having the management of the locomotive and train to use a reasonable degree of care and skill in the management of said locomotive and train with the purpose of preventing injury to plaintiff's horse, and if from all the facts and circumstances proved, the jury find that the defendant's employees failed to use a reasonable degree of care and skill in the management of said locomotive and train, such failure was negligence, and if the jury further find that the injury to plaintiff's horse was caused by such negligence on the part of defendant's employees in the management of the locomotive and train, the verdict should be for plaintiff, assessing the damages at a sum equal to the actual value of the horse.

2. Unless the jury find from the facts and circumstances proved, that the employees of the defendant having the management of the locomotive and train did fail to use a reasonable degree of care and skill in the management of said locomotive and train, for the purpose of avoiding injury to plaintiff's horse, the verdict should be for defendant.

The defendant asked a great many instructions, among which are the following, which the court refused:

5. If the jury believe from the evidence that the horse was quietly grazing beside the track and fifteen or twenty feet from it when the engineer first saw it, yet the engineer was not bound to stop his train until the animal was in danger of being struck, and if the jury find from the evidence that the engineer did all he could to stop his train and avoid the injury after knowing of the danger of the animal, they will render their verdict for defendant.

6. If the jury believe from the evidence that when the engineer first saw the horse it was quietly grazing beside the track, and some fifteen or twenty feet from it, then this was not sufficient to require the engineer to stop his train or take any precaution to avoid an unexpected danger, and if the jury find that the engineer did all he could to stop his train and avoid striking the animal after knowing of its danger, they should find for defendant.

The jury returned a verdict in favor of plaintiff for \$100. Judgment entered accordingly; from which the defendant has appealed to this court.

The question to be decided arises on the instructions. The plaintiff seemed to think, and the trial proceeded on the assumption, that if the injury occurred within the limits of an incorporated town no recovery could be had without proof, first made by the plaintiff, of actual negligence on the part of defendant. This was evidently on the hypothesis that a railroad company is not required to fence inside of the corporation. As to that the company may or may not fence. The consequence of not fencing at certain points on its line is a fixed liability resulting therefrom for injuries to stock. There are places within incorporated towns where the railroad may fence, as where there are no streets or alleys, and the public travel and convenience would not be interrupted by such fence. This matter has been reviewed and the law so settled in the case of *Wymore v. Hann. & St. Jo R. R. Co.*

It may be inferred, perhaps, from the statement made by plaintiff in this case, that the injury occurred at a street-crossing, as it is called "a public crossing." If it was a street and a point within the corporate limits where the company might not fence on account of obstructing a thoroughfare, the absence of negligence on the part of the servants of defendant in running and managing the train would relieve the defendant from liability for the injury.

As to the rate of speed the train was running, it may be as well to observe that, as a matter of law, no rate of speed is prescribed at which a train may run, so that negligence *per se* may be predicated of it. *Maher v. Railroad Co.*, 64 Mo. 267. Negligence is a relative term, and each case must, in large measure, depend on its own peculiar facts. What would be a negligent rate of speed under certain circumstances might be wholly blameless under others. So what would be in common parlance gross negligence in one state of circumstances might be due caution in another.

If, as a matter of fact, the engineer in charge of the engine knew the horse was at the point grazing and saw him in time to check his train before reaching him, that fact of course was not sufficient to demand of him a slower speed. He had no reason to anticipate that the horse would take fright and attempt to cross the track. If on the other hand he saw the animal start down the ditch toward the road-crossing, being cognizant, as he was, of the road at that point, and knowing the liability to take, under circumstances of danger, the very path to it, it became and was his plain duty to have immediately put forth every effort at his command, without peril to his train, to check it and avert the injury. And if, after discovering the horse in motion going toward the crossing, he could have reasonably and safely so far stopped the train as to have avoided the collision, and neglected to do so, the defendant was clearly liable.

In this view of the law the instruction given on plaintiff's request is defective because it did not go far enough. It failed to tell the jury that defendant was liable if the engineer, after discovering the danger, failed to use proper diligence and effort to avoid the injury. *Wallace v. Railway Co.*, 74 Mo. 594. This would not, however, be sufficient ground for reversal if there had been other instructions given covering this aspect of the law. But in neither of the instructions given by the court on its own motion, was this matter put before the jury, at least not with such perspicuity as to lead their minds to the real matter constituting the negligence under the circumstances. The instructions were too abstract.

The defendant asked an unnecessary number of instructions, many of them presenting false issues, and some differing in no material particular from the principles laid down in those given by the court.

The fifth and sixth instructions asked by defendant would have more nearly directed the minds of the jury to the real issue than any presented. The only just criticism to which they are subject is the employment of the word "knowing." It was liable to misapprehension or abuse in argument. The better expression would be "after being reasonably apprised of the danger to the horse."

There is no reason why the trial judge could not in two instructions clearly embody the whole law applicable to the facts of this case, and reject all the rest offered. Instructions, while avoiding commentary on the evidence, ought not to be mere abstractions; but should be so applied to the facts of the particular case on trial as to aid the jury in applying the facts to the law. *Zimmerman v. Railroad Co.*, 71 Mo. 490, 491.

In order that this case may be properly placed before the jury, the judgment of the circuit court is reversed and the cause remanded. All concur.

**No Rate of Speed Constitutes Negligence Per Se.—In actions for running**

over and injuring cattle, it is well settled that no possible rate of speed amounts to negligence *per se*. *Maier v. Atlantic & Pacific R. Co.*, 64 Mo. 267; *McKonkey v. Chicago, B. & Q. R. Co.*, 40 Iowa, 205; *Powell v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. R. Cas. 467.

**High Rate of Speed Evidence of Negligence.**—But a very high rate of speed may go to the jury as evidence of negligence. *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Edson v. Central R. Co.*, 40 Iowa, 47; *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215; *Reeves v. Delaware, etc., R. Co.*, 30 Pa. St. 454; *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397; *Burton v. Phila., W. & B. R. Co.*, 4 Harr. (Del.) 252; *Pacific R. Co. v. Houts*, 12 Kans. 328; *Indianapolis, etc., R. Co. v. Hamilton*, 44 Ind. 76; *Latty v. Burlington, etc., R. Co.*, 38 Iowa, 250.

**General Reference.**—For a collection of the authorities as to the duty of an engineer of a railroad company upon perceiving cattle near the track, see *Kansas City, Ft. S. & G. R. Co. v. Hines*, and note, *supra*.

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## WINSTON

v.

## RALEIGH AND GASTON R. R. Co.

(90 *North Carolina Reports*, 66.)

The plaintiff's cow was killed by defendant's freight train, and in a suit for damages for the injury the engineer testified that the train was running fifteen miles an hour, at night, and by means of the head-light a cow could be seen seventy-five yards in advance; that he discovered the animal at that distance, blew on brakes, but could not possibly stop the train and avoid the accident. The judge charged the jury that the company should provide such appliances as would enable the engineer to stop the train within the distance mentioned; and if not furnished, then it was the defendant's duty to so slacken the speed that the train could be stopped within that distance. *Held*, error. The company cannot be held to so rigid a rule of accountability where, as here, every reasonable precaution was used.

No counsel for plaintiff.

I. W. Hinsdale and I. Devereux, Jr., attorneys for defendant.

**SMITH, C. J.**—In the early part of the night in June, 1882, the defendant's train, consisting of two coaches and several box cars, running upon its track on a down grade, came in contact with two cattle, belonging to the plaintiff, and killed them. The plaintiff's action, commenced in September following before a justice of the peace and removed to the superior court by appeal, is for the recovery of their value, as damages resulting from the alleged negligence of the officers and employees of the defendant in running and managing the train.

The testimony of the engineer in charge, though in conflict with that of the other witnesses for the plaintiff, was in substance "that

the train was then moving at the speed of fifteen miles an hour, while eighteen was schedule-time; that the head-light on the engine illuminated the track so that an object could be seen seventy-five yards in advance; that he discovered the cattle at that distance in front of him, and immediately blew the whistle rapidly in quick succession to alarm the cattle, shut off steam and gave the signal to put on brakes; that there were two brakemen on the train; and it was impossible to arrest its progress before striking the cattle." The charge complained of relates to this aspect of the case and is as follows:

It was the duty of the company to provide the train with such appliances as would enable the engineer to stop the train within the distance at which an object, as large as a cow, could be discovered by means of the head-light, or if such appliances were not furnished, then it was the defendant's duty to slacken the speed of the train that it could be made to come to a halt within that distance.

The instruction is in substance that the company cannot run their trains in the night-time faster than at a speed which will admit by the use of brakes of being checked, and the train brought to a stop before it has traversed the space illuminated by its head-light, without incurring liability for injury to stock straying on its road-bed. In this statement of the law we do not concur, and if it prevailed it would seriously impair the usefulness of railroad transportation, which depends largely on the regularity and rapidity of its running by night as well as by day. The occasional and unavoidable injury sometimes done to property, in the language of the court in *Dogget v. Railroad*, 81 N. C. 459, is greatly outweighed by the benefits conferred upon the whole country by railway transportation, and it would be an unwise policy to hamper the latter and diminish its usefulness by needless restraints.

The cases reviewed in that case and those cited in the brief of defendant's counsel, *Montgomery v. Railroad*, 6 Jones, 464; *Proctor v. Railroad*, 72 N. C. 579; *Forbes v. Railroad*, 76 N. C. 454, leave little for us to say upon the general subject. It is true the law presumes negligence, but this is subject to rebuttal upon proof of facts which show there was none.

We are of opinion that the railroad cannot be held to the rigid rule of accountability laid down by the court, that unless a train can be stopped before reaching an object brought to view by the head-light, it must slacken its speed so that it can be brought to a stand-still. It appears from the engineer's evidence that everything was done which could be done, after the discovery of the cow, to avoid the collision. If accepted by the jury, it was a full defence; for we cannot impute culpability in the mere fact that the train was moving as described by him. Every reasonable precaution is required to avoid doing injury to the property of others,



but trains are not expected to run so slowly as to deprive the public of great advantages of rapid intercourse and quick exchange of products. There is error and must be a new trial, and it is so ordered.

Error.

*Venire de novo.*

**Analogous Cases.**—The following cases are substantially to the same effect as that above reported: *Bellefontaine, etc., R. Co. v. Schruyhart*, 10 Ohio St. 116; *Memphis City R. R. Co. v. Loagull, Adm'r*, 15 Am. & Eng. R. R. Cas. 459; *Louisville & Nashville R. R. Co. v. Milan, Ex'r*, 15 Am. & Eng. R. R. Cas. 507. See also *Alabama Gt. S. R. R. Co. v. Jones*, 71 Ala. 487; s. c., 15 Am. & Eng. R. R. Cas. 549.

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NATCHEZ AND JACKSON R. R. Co.

v.

McNEIL.

(61 *Mississippi Reports*, 434.)

Railroad companies do not owe it to the owners of stock to procure the best appliances regardless of cost for the management of their trains to prevent injury to stock straying upon their tracks.

APPEAL from the Circuit Court of Hinds County.

The facts are stated in the opinion.

Nugent & McWillie for the appellant.

Wells & Williamson for the appellee.

COOPER, J.—This is an action to recover the value of certain stock killed by the train of the appellant. On the trial the defendant placed upon the stand as a witness the engineer who had charge of the train by which the stock was killed, and by him proved that the equipments of the train were such as are usual and sufficient. On cross-examination he stated that the train was not supplied with air brakes, and that by the use of such brakes a train could be more readily stopped than by those in use by the company.

The plaintiff asked and obtained from the court the following instruction: "Railroad companies must have the best appliances for the management of their trains and locomotives and skilled employees, and if by reason of the lack of any of these they kill stock, they are liable for damages to the party injured."

The instruction ought not to have been given. It is the duty of railroads to use reasonable care and caution to prevent injury to stock straying upon their tracks, and what is reasonable skill and

care is determinable in some measure by the character of the agency used by them. But they do not owe it to the owners of stock to procure the best appliances regardless of cost for the management of their trains. Such a rule would necessitate the same equipment on all trains regardless of character, and on all roads regardless of their ability to buy the appliances. *Bartley v. Ga. R. R. Co.*, 60 Ga. 182.

Judgment reversed.

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TYLER

v.

ILLINOIS CENTRAL R. R. Co.

(61 *Mississippi Reports*, 445.)

When it is shown in a suit for damages for injury to stock that the railroad company had fenced its track on both sides and had opened a gap on one side for its own convenience, and that through this gap the stock had strayed on the track and were killed while attempting to escape through the gap, there being no other means of egress, the jury should be allowed to say whether that degree of care which these circumstances called for had been exercised by those in charge of the train.

APPEAL from the Circuit Court of Hinds County.

The appellant sued the appellee to recover damages for a cow killed by a train of the appellee. On the trial it was shown that at the point where the cow was killed the railroad track had been fenced by the appellee for some distance on both sides; and that some time prior to the killing the appellee for its own purposes had opened a gap in the fence on one side of the track, through which gap the cow had strayed on to appellee's right of way and crossed over the track to the side on which there was no opening in the fence, and becoming alarmed by the approaching train was killed while attempting to recross the track in order to escape at the gap through which she had entered. It was shown that everything was done which could be by those in charge of the train to prevent the killing after the cow had gotten on the track, but the point at which the cow ran on the track was so near the approaching train that the collision was then inevitable. The engineer knew of the condition of the fence at the point where the cow was struck, and had seen the cow grazing by the side of the track for some distance before he reached her, but did not attempt to check his train until he saw the cow run on the track.

The court instructed the jury to find for the defendant railroad company, and this action of the court is assigned for error.

H. R. Ware for the appellant.

W. P. & J. B. Harris for the appellee.

CHALMERS, J.—The railroad company erected a fence on either side of its track for several miles in the neighborhood of Jackson. For its own convenience it then opened a gap in its fence for the benefit of its employees, and this was well known to all its engineers and conductors, who, nevertheless, continued to use it as before. The cow of appellant was attracted upon the road-bed by this opening in the fence, and while attempting to get back to the opening was run over and killed by the engine and cars of the appellees. Appellees having proved by the engineer and brakemen the observance of every care and caution practised by it with regard to cattle generally, sought and obtained from the Circuit Court an instruction directing the jury to find against the owner of the cow, which was accordingly done. The charge, of course, was based on *Packwood v. Railroad Co.*, 59 Miss. 280; s. c., 7 Am. & Eng. R. R. Cas. 584, in which it was held that when the railroad company has successfully met every presumption of law by proof of the actual occurrences at the time of killing, it was the duty of the jury to find for the defendant. The authority was not applicable in this case. It only applies where the appellant, accepting the responsibility of the law, shows by proof that it has met every requirement which the facts of the case devolved upon it. We cannot say that this was done in the present case. It would seem that the responsibility must be different when the railroad company itself has, by the construction and subsequent opening of its fence, invited the animal into its inclosure and then killed it while attempting to escape. We prefer in all such cases that the jury be allowed to say whether there was or was not negligence in its dealing with the animal, and should they decide that it owed some other and further duty to an animal so confined than to one which had a right of egress unobstructed by any act of the railroad company, we could not say as a matter of law that its decision was wrong.

For the error in granting the instructions mentioned, we reverse the judgment and grant a new trial.

## VICKSBURG AND MERIDIAN R. R. Co.

v.

HART.

(61 *Mississippi Reports*, 468.)

There must be a causal connection between the negligence and the injury complained of in a suit against a railroad for injury to stock. It is error to instruct the jury that any negligence will entitle the plaintiff to recover.

The fact that the brakemen on the train were not at their posts will not entitle the plaintiff to recover for stock killed, unless it is also shown that their absence contributed to the injury.

APPEAL from the Circuit Court of Hinds County.

The appellee sued the appellants to recover damages for a mule killed by the locomotive and cars of the latter. At the time the mule was killed the train was running on a down-grade around a sharp curve from right to left. The engineer was at his post on the right side of engine, but from his position, owing to the sharpness of the curve, could not see the mule, and did not see it until it was struck. His attention was called to the fact that the mule was on the track by the fireman, who was supplying the engine with fuel, and he immediately whistled for brakes; but it was too late, and the collision was unavoidable. It was shown that at the time the whistle blew the brakemen were in the caboose and not at their respective posts on the top of the train, but got on top immediately and applied the brakes. S. Jackson, a witness for the plaintiff, testified that the mule ran twenty-five or thirty yards in front of the train, "kicking back at it," before it was struck. The killing occurred within the corporate limits of the city of Jackson, and at the time the train was running at a greater rate of speed than six miles an hour.

The court gave the following instructions for the plaintiff, which were excepted to by the defendant:

(2) The law presumes that every killing of stock by a railroad company is done carelessly and negligently, and the burden of proof is on the railroad company to show that there was no negligence or carelessness on the part of the company.

(3) If the jury believe from the evidence that the brakemen on the train that killed the plaintiff's mule were not at their posts, but inside of the cars, and that after the whistle for brakes to be applied had been sounded the brakemen had to climb out of the cars in order to apply the brakes and get to their posts, the jury would be warranted in concluding that there was negligence or carelessness.

(4) It is the duty of all employees on a railroad train to be at

their posts while the trains are in motion, and the brakemen on such trains should be at their posts, so as to be ready to apply the brakes as soon as the signal is given.

Nugent & McWillie for the appellant.

Shelton & Shelton for the appellee.

CAMPBELL, C. J.—It was error to instruct the jury for the plaintiff that the absence of the brakemen from their posts when the whistle sounded was negligence, and that any negligence entitled the plaintiff to recover, without embracing the idea of a causal connection between their negligence and the destruction of the mule. If brakemen were not at their post of duty, but the killing of the mule could not have been avoided if they had been, their absence would not have made any difference as to the result, and should not have affected it. The third and fourth instructions for the plaintiff were wrong for the reason stated. The evidence strongly suggests the insufficiency of an immediate application of brakes to have prevented the catastrophe. The evidence leaves but little doubt that the train was running at a greater speed than six miles an hour within the corporate limits of Jackson when the mule was killed. If so, the recovery was right, notwithstanding the erroneous instructions on another view of the case. There is the usual conflict between the employees of the appellant and other witnesses as to this, but that the train overtook the mule running from it is conclusive that the speed of the train was greater than six miles an hour, and sufficient to determine the case in favor of the appellee. We think it improbable that a different result would occur on a new trial, and as the case is before us on appeal from a judgment overruling a motion for a new trial, the judgment is affirmed.

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CHICAGO, R. I. AND PACIFIC RY. Co.

v.

M'GLINN.

(114 *United States Reports*, 548.)

The clause in the act of the Legislature of Kansas ceding to the United States the Fort Leavenworth Military Reservation which limits the grant so far as to reserve to the State certain rights and jurisdiction in the territory ceded is valid.

The laws of the State of Kansas rendering railroad companies liable for killing cattle when they have failed to fence their tracks are operative within the limits of the Fort Leavenworth Military Reservation.

THIS was an action brought by the defendant in error as plaintiff to recover the value of a cow killed by the engine and cars of

the plaintiff in error. Judgment for the plaintiff, which was affirmed by the Supreme Court. The facts which raise the Federal question are stated in the opinion of the court.

E. C. Cook (with whom were Thomas F. Withrow and M. A. Low on the brief) for plaintiff in error.

W. Hallett Phillips for defendant in error.

**FIELD, J.**—This case comes here from the Supreme Court of the State of Kansas. It is an action for the value of a cow alleged to have been killed by the engine and cars of the Chicago, Rock Island & Pacific Ry. Co., a corporation doing business in the county of Leavenworth, in that State. It was brought in a State District Court, and submitted for decision upon an agreed statement of facts, in substance as follows: That on the 10th of February, 1881, a cow, the property of the plaintiff, of the value of \$25, strayed upon the railroad of the defendant at a point within the limits of the Fort Leavenworth Military Reservation in that county and State, where the road was not inclosed with a fence, and was there struck and killed by a train passing along the road; that the Reservation is the one referred to in the act of the Legislature of the State of February 22, 1875; that a demand upon the defendant for the \$25 was made by the plaintiff more than thirty days before the action was brought; and that, if the plaintiff was entitled to recover attorney's fees, \$20 would be a reasonable fee.

The action was founded upon a statute of Kansas of March 9, 1874, entitled "An act relating to killing or wounding stock by railroads," which makes every railway company in the State liable to the owner for the full value of cattle killed, and in damages for cattle wounded, by its engine or cars, or in any other manner in operating its railway. It provides that, in case the railway company fails for thirty days after demand by the owner to pay to him the full value of the animal killed, or damages for the animal wounded, he may sue and recover the same, together with a reasonable attorney's fee for the prosecution of the action. It further provides that it shall not apply to any railway company the road of which is inclosed with a good and lawful fence to prevent the animal from being on the road. Laws of Kansas, 1874, ch. 94.

On the 22d of February, 1875, the Legislature of Kansas passed an act ceding to the United States jurisdiction over the Reservation, the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States Military Reservation, known as the Fort Leavenworth Reservation, in said State, as declared from time to time by the President of the United States; saving, however, to the said State the right to serve civil or criminal process within said Reservation, in suits or prosecutions for or



on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of such cession and Reservation; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property on said Reservation." Laws of Kansas, 1875, ch. 66.

The District Court gave judgment for the plaintiff, assessing his damages at \$45, an amount which was made by estimating the value of the cow killed at \$25, and the attorney's fee at \$20, these sums having been agreed upon by the parties. The case was carried to the Supreme Court of the State, where the judgment was affirmed, that court holding that the act of Kansas, relating to the killing or wounding of stock by railroads, continued to be operative within the limits of the Reservation, as it had not been abrogated by Congress, and was not inconsistent with existing laws of the United States. In so holding the court assumed, for the purposes of the case, without however admitting the fact, that the act ceding jurisdiction to the United States over the Reservation was valid, and that the United States had legally accepted the cession. To review this judgment the case is brought here.

Two questions are presented for our determination; one, whether the act of Kansas purporting to cede to the United States exclusive jurisdiction over the Reservation is a valid cession within the requirements of the constitution; the other, if such cession of jurisdiction is valid, did the act of Kansas relating to the killing or wounding of stock by railroads continue in force afterwards within the limits of the Reservation?

It can hardly be the design of counsel for the railroad company to contend that the act of cession to the United States is wholly invalid, for, in that event, the jurisdiction of the State would remain unimpaired, and her statute would be enforceable within the limits of the Reservation equally as in any other part of the State. What we suppose counsel desires to maintain is, that the act of cession confers exclusive jurisdiction over the territory, and that any limitations upon it in the act must therefore be rejected as repugnant to the grant.

This point was involved in the case of *Fort Leavenworth R. R. v. Lowe*, 114 U. S. 525. We there held, that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the federal government, is exempted, as an instrumentality of the government, from any such control or interference by the State as will defeat or embarrass its effective use for those purposes. But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over

it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the Legislature of a State to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes.

Upon the second question the contention of the railroad company is that the act of Kansas became inoperative within the Reservation upon the cession to the United States of exclusive jurisdiction over it. We are clear that this contention cannot be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. *American Insurance Co. v. Canter*, 1 Pet. 542; Halleck, *International Law*, ch. 34, § 14.

The counsel for the railroad company does not controvert this general rule in cases of cession of political jurisdiction by one nation to another, but contends that it has no application to a mere cession of jurisdiction over a small piece of territory having no organized government or municipality within its limits; and argues

upon the assumption that there was no organized government within the limits of Fort Leavenworth. In this assumption he is mistaken. The government of the State of Kansas extended over the Reservation, and its legislation was operative therein, except so far as the use of the land as an instrumentality of the general government may have excepted it from such legislation. In other respects, the law of the State prevailed. There was a railroad running through it when the State ceded jurisdiction to the United States. The law of the State, making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars, and the ringing of bells as a warning to others of their approach.

It is true there is a wide difference between a cession of political jurisdiction from one nation to another and a cession to the United States by a State of legislative power over a particular tract, for a special purpose of the general government; but the principle which controls as to laws in existence at the time is the same in both. The liability of the railroad company for the killing of the cow did not depend upon the place where the animal was killed, but upon the neglect of the company to inclose the road with a fence which would have prevented the cow from straying upon it. The law of Kansas on the subject, in our opinion, remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated. The judgment is accordingly affirmed.

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## HALVERSON

v.

## MINNEAPOLIS AND ST. L. RY. CO.

(*Advance Case, Minnesota. May 15, 1884.*)

A wire fence constructed in accordance with the provisions of Gen. St. of Minnesota 1878, c. 18, § 2, would be a compliance with Gen. St. 1878, c. 34, § 54, requiring railroad companies to fence their roads.

Whenever the building of a fence would have prevented an accident to domestic animals there, the negligence of the railroad company in not fencing its road is the cause of the injury, and the company would be liable, regardless of the species of the animals.

In the case of sheep or swine this would be a question of fact, depending on the size of the animals.

APPEAL from a judgment of the District Court, Waseca County.

John Carmody for respondent, Hans Halverson.

Colleston Bros. for appellant, Minneapolis & St. L. Ry. Co.

**MITCHELL, J.**—We are of opinion that a wire fence constructed in accordance with the provisions of Gen. St. 1878, c. 18, § 2, would be a compliance with Gen. St. 1878, c. 34, § 54, requiring railroad companies to fence their roads. This was held *arguendo* in *Fitzgerald v. St. P., M. & M. R. Co.*, 29 Minn. 336; s. c., 8 Am. & Eng. R. R. Cas. 310. The statute expressly provides that such a fence shall be sufficient and a compliance with the law, "in all cases where any law of this State requires to be erected or maintained any fence or fences for any purpose whatever." Gen. St. c. 34, § 55, provides that railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies, and a failure to build fences shall be deemed an act of negligence. No distinction is here made between different kinds of domestic animals. Whenever the building and maintaining of a fence would have prevented the accident, then the negligence of the company in not fencing its road is the cause of the injury, and it is liable, under the statute, regardless of the species of the domestic animals killed or injured.

In the case of certain animals, such as horses, it would be clear, as a matter of law, that a fence would "turn" them; in the case of others, like sheep or swine, this would be a question of fact depending on the size of the animals. In this case, the animal killed (a hog) was of a species that might be turned by a lawful fence, and the evidence as to the size of the animal does not so clearly or conclusively show that it would not, that we cannot say that the trial justice erred in finding that the negligence of the company in failing to fence was the cause of the injury.

Judgment affirmed.

**Analogous Cases.**—See as to the kind of animal embraced by the fence-laws, Ohio, etc., *R. Co. v. Brubaker*, 47 Ill. 462; Toledo, etc., *R. Co. v. Cole*, 50 Ill. 185; *Lee v. Minneapolis & St. L. R. Co.*, *infra*.

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**SHELLABARGER**

*v.*

**CHICAGO, R. I. AND P. RY. CO.**

(*Advance Case, Iowa. April 22, 1885.*)

A railroad company fully performs its duty as to fencing when it erects a fence that is reasonably sufficient to prevent live-stock from coming upon the track.

**APPEAL** from Muscatine circuit court.

The plaintiff was the owner of three colts which were killed by a train of cars on defendant's railroad, and he claims to recover

damages upon the alleged grounds that the defendant had failed to properly fence its road, and failed to keep its fence in proper repair, and that said colts were killed by reason of such failure and neglect. It is further averred that the colts were killed by the gross carelessness and negligence of the employees of the defendant who operated and run the said train of cars. The answer was a general denial. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff. Defendant appeals.

J. Carskaddan for appellant.

D. C. Cloud for appellee.

ROTHROCK, J.—The plaintiff's colts were killed by being struck by a train on defendant's road at a point where it had the right to fence its track and right of way. The evidence tends to show that the railroad was fenced with a five-board fence, with posts about six feet distant from each other, and that the boards were nailed on the posts, with proper spaces between the boards, and that the fence was four feet and eight inches in height. There was a highway crossing near where the accident happened, and the colts were in the highway, running towards the crossing, and on the approach of a freight train it appeared to the engineer that they were attempting to cross the railroad in front of the train. The whistle was sounded to drive them back and prevent a collision with them, and in their fright they dashed against the railroad fence and broke it down, and went upon the right of way. They were struck and killed by another freight train which followed a mile or two behind. The accident happened in the night. The court gave to the jury the following, among other, instructions: "(6) In reference to the duty of a railroad company you are instructed that when its right-of-way fences are constructed they must be of such construction and strength as to absolutely prevent stock from getting through, under, or over the same; but after its fences have been constructed, it is only the duty of the railroad company to use ordinary care and diligence to keep itself informed of the condition of its fences, and to keep them in such condition of renewal and repair as to absolutely prevent stock from getting through or over them, and if it fails so to do it is negligent, and liable for injuries to stock caused by such negligence." This instruction was duly excepted to, and counsel for appellant claim that the defendant's duty is fully performed by the erection of such a fence as is reasonably sufficient to prevent live-stock from coming upon the track.

The statute does not require a railroad company to fence its road. It provides that "any corporation operating a railway, that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any live-stock injured or killed by reason of the want of such

fence," etc. Code, § 1289. The requirement is that the railroad company shall be liable if it fails to fence its road "against live-stock running at large." This means such a fence as is reasonably sufficient to prevent live-stock from going upon the track. The term "fence" has a signification and meaning well understood in the law, as well as in common parlance. It does not mean an impassable barrier, or such a structure as is absolutely insurmountable by any live-stock, however breachy or vicious the animals may be. Farmers or others, desiring to protect their lands and crops from the incursions of live-stock, erect such fences as are reasonably sufficient for that purpose; and we think that when there is a requirement to erect fences, such as are usually understood to be sufficient must be held to have been in the mind of the legislature.

We think it has been quite uniformly understood by the courts and the legal profession in this State, since the enactment of the railroad fence law in 1862, that a fence that is reasonably sufficient fulfils all the requirements of the law. The decisions of this court in several cases seem to recognize such to be the rule. See *Lemmon v. Chicago & N. W. R. Co.*, 32 Iowa, 151; *McKenly v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 641; *Hammond v. Chicago & N. W. R. Co.*, Id. 168; *Fernow v. Railroad Co.*, 22 Iowa, 530; *Hilliard v. Railroad Co.*, 37 Iowa, 442.

In our opinion the instruction under consideration imposes a measure of liability not authorized by law. **Reversed.**

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ATCHISON, T. AND S. F. R. R. Co.

v.

SHAFT.

(*Advance Case, Kansas. May 8, 1885.*)

The railroad stock law of 1874 construed, and *held*, that generally a railroad company in order to be absolved from liability for stock killed by it in the operation of its railroad must have its railroad "inclosed with a good and lawful fence, to prevent such animals from being on such road."

A railroad company is not absolved from complying with the express terms of the statute requiring it to inclose its road with a good and lawful fence, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad company, rendering it improper for the company to fence its road.

No private interest or convenience or inconvenience on the part of a railroad company will alone be sufficient to absolve it from fencing its road where the statute, in express terms, requires that the road shall be fenced.

Nor will any private interest or convenience on the part of individuals be sufficient to absolve a railroad company from fencing its road.

Building fences along the sides of a railroad is not alone sufficient. The rail-



road must be "inclosed" with fences or other barriers; and whenever, for that purpose, cattle-guards are necessary at the crossing of public highways or other public places, cattle-guards must be put in.

The railroad company owned a strip of land 250 feet wide by 2400 feet long, which it used for station grounds. The plaintiff owned a steer, which he permitted to run at large near the station grounds. This animal passed along the highway and onto the station grounds, and wandered along the same until it passed upon the company's right of way and upon the railroad track, where it was killed. Neither the railroad track, nor the right of way, nor the station grounds was inclosed with a fence. A fence, however, extended along one end and a part of the two sides of the station grounds. The place where the animal was killed, though used as a part of the defendant's station grounds, was not necessary for such use. *Held*, that, assuming that land necessarily used for station grounds need not be fenced, still, as the place where the animal was killed was not necessary in the present case for the use of the railroad company as a part of its station grounds, the same should have been fenced.

Where a railroad company is, for any reason, relieved from fencing its road at some particular place or places, then it must construct fences or other barriers as near thereto as is reasonably practicable. And it devolves upon the railroad company to show that it is so relieved.

The present plaintiff is not prevented from recovering by reason of contributory negligence.

#### ERROR from Chase County.

This was an action brought by Clay Shaft against the Atchison, Topeka & Santa Fe R. R. Co. in the district court of Chase County to recover damages for the killing of a steer belonging to the plaintiff. The plaintiff alleged in his petition, among other things, that the steer in question, without fault on the part of the plaintiff, strayed in and upon the track and ground occupied by the railroad company at a point west of Crawford station, in the county of Chase, where such track ought to have been, but was not, inclosed with a good and lawful fence, and that the defendant, by its agents and servants, not regarding its duties in that respect, carelessly and negligently ran and managed its locomotive and cars so that the same ran against and over the said steer, and wounded and killed the same. The plaintiff claimed \$55 damages, and \$30 as attorney's fees. The defendant denied generally, and also set up contributory negligence on the part of the plaintiff.

The case tried by the court, without a jury, and the court made special findings of fact and conclusions of law as follows:

"At Crawford station, in Chase County, Kansas, the defendant owns a strip of land 250 feet wide and 2400 feet long, which it uses as its station grounds at that point. At each end of this strip of ground there is a cattle-guard, over which the main track of defendant's road passes. These cattle-guards are connected on each side with fences running across the end of this strip of ground. Beyond each end of this strip of ground is the defendant's right of way, 100 feet wide, over which the main track of defendant's railroad passes as it leaves this strip of land. That about 800 feet

from the east end of this strip used as station grounds a public highway crosses this strip of land, north and south, in an angling direction. That 275 feet from the west end of this strip a switch leaves the main line, and thence runs east (north of the main line) 1400 feet, at which point it crosses the public highway, and again joins the main track 600 feet east of the public highway. That 600 feet from the east end of this strip, on the north of the switch and main track, the defendant had its stock-yards at said station built upon this strip. That between the switch and the main track is defendant's depot building at this station, which is about 400 feet west of the public highway crossing this strip. That 100 feet west of the depot building is the water-closet of the defendant at this station. That 75 feet west from the water-closet is the water-tank. That 600 feet west from the point where the public highway crosses the south line of this strip is defendant's well upon this strip, from which it gets its water to supply its water-tank. That about 1200 feet west from the point where the public highway crosses the south line of this strip is the section-house of defendant, in which its section-men live. That the tool-house, belonging to defendant at this station, is on this strip, north of the main line, and about 100 feet east of the west end of this strip. That this tool-house is where the section-men living in the section-house keep their tools, and to it they have to have constant access. That the switch on this strip is daily used for switching purposes, and for trains to side-track upon.

"That the only way in which grain is loaded at this station is by loading the same from wagons into a car; that when grain is loaded from a wagon into a car the car is placed upon this switch, and frequently, while grain is so being loaded, such car has to be moved from point to point along a portion of this switch, to keep out of the way of train-switching and side-tracking at this point; that there is considerable hay, corn, and wheat loaded at this station from wagons into cars; that from the point where the west line of the public highway crosses the north line of this switch, a lawful fence has been built by the defendant, running west, along the north line of this strip to the west end thereof, and across the west end, in connection with the cattle-guard there, and thence east along the south line of said strip, around the section-house, for a distance of about 1100 feet; that outside of this fence there is no fence of any kind around this strip of land; that immediately joining the south line of this strip, from the east end of the fence thereon, to the east end thereof, is the village of Crawford, which has been platted, and that one of the laid-out streets of said village runs parallel with and adjoining the south line of this strip from the end of the fence on the south side to the east end of the same; that the only way the public have the right to ingress and egress to and from the station building, at this station, is by entering the

station grounds upon the public highway, which crosses the same, or from the street in the village of Crawford, which adjoins and runs parallel with the south line of defendant's strip; that the defendant is operating a railroad through Chase County, Kansas, and that this station is upon such line.

"That the animal described in plaintiff's petition was allowed by the plaintiff to run at large upon uninclosed land north of the station at Crawford; that it got upon the station grounds by coming down the public highway to the point where it crosses this strip of land used as station grounds, and from there it wandered west upon the said strip of ground so used as station grounds to a point about 75 feet east of the west end of said strip of ground, being a point about 1550 feet west of where the public highway crosses said strip, and about 200 feet west of the west end of the switch, and 1200 feet west of the centre of the depot building, although it could have crossed the station grounds and passed along on the south of the same to some point, and then have entered upon such station grounds; and there, as this animal, with a number of others, was feeding south of the track, it became frightened by the noise of an approaching train and jumped upon the track in front of such train, so close to the train that it was impossible to have prevented the train from striking it, and it was there struck by the train and killed; that owing to the fence around the west end of the strip there was formed a pocket at the west end, which being open to the east to the public highway, and from the south to the end of the south fence, made a sort of trap which tended to prevent animals getting therein from escaping from approaching trains; that the defendant in so constructing its fence at the west end of this strip as to form this pocket, and leaving the access thereto as above stated, was negligent; that such negligence was the direct cause of the death of said animal; that said animal was of the value of \$45; that there could not be any fence placed across said strip of land at any point between the public highway and the station building which would prevent animals from getting from the highway to the station grounds, except the same be built across the track and switch, by cattle-guards, and except there should be gates put therein for the ingress and egress of the public and the defendant's employees to and from said station-house.

"That cattle-guards cannot be placed across any railroad track upon which switching has to be done, with safety to the employees who have to do such switching; that the part of this strip of land upon which the animal was killed was not necessary for the use of defendant as part of its station ground; that from the point where the main track left this strip of ground at the west end to the point where the switch left the same east of the west end, there could not have been any cattle-guards made across said track with any safety to such employees of the defendant as would,

from time to time, have to uncouple or couple cars on the main line west of the west end of the switch, preparatory to placing such cars or trains upon such switch from the west. Crawford Station was a station on the defendant's road, used by it as a station for the public to get on and off its cars at, and to load freight on its cars, and to take freight off from its cars. The switch there was used for standing cars upon, which were to be loaded and unloaded for the public, as well as for passing trains.

"As a conclusion of law upon the foregoing facts, I find that the defendant is liable to the plaintiff for the value of said animal as found, and that judgment be rendered for the same, and for costs of this action, against the defendant."

The defendant moved for judgment upon the foregoing findings of fact, which motion was overruled by the court, and judgment was then rendered in favor of the plaintiff and against the defendant for the sum of \$45 damages, and costs of suit taxed at \$22.86. The defendant, as plaintiff in error, now brings the case to this court.

A. A. Hurd and C. N. Sterry for plaintiff in error.

Young & Kelly for defendant in error.

VALENTINE, J.—This was an action brought by Clay Shaft against the Atchison, Topeka & Santa Fe R. R. Co. in the district court of Chase County to recover damages for the killing of a steer belonging to the plaintiff. The allegations of the plaintiff's petition were such that he might have recovered either under chapter 94 of the Statutes of 1874, because of a want of a legal fence inclosing the defendant's railroad (Comp. Laws 1879, pp. 784, 785, pars. 4915–4919), or under chapter 93 of the Laws of 1870, for negligently killing the plaintiff's animal (Comp. Laws 1879, p. 784, par. 4913), or under the rules of the common law, for negligently killing the same.

It is admitted in the present case that the defendant killed the plaintiff's animal in the operation of its railroad, and that the defendant's railroad was not inclosed with a good and lawful fence, or any fence, where the animal was killed; and while the defendant claims that the railroad should not have been inclosed where the animal was killed, and that the defendant was not guilty of any negligence in killing the same, and that the plaintiff was guilty of contributory negligence in permitting his animal to run at large, the plaintiff, on the other hand, claims that the railroad should have been inclosed, and also that the defendant killed his animal, not only through negligence, but through gross negligence, and that the plaintiff was without fault on his part.

Sections 1 and 5 of said statute of 1874 read as follows:

"Section 1. Every railway company or corporation in this State, and every assignee or lessee of such company or corporation, shall

be liable to pay the owner the full value of each, any, [and] every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever, in operation of such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not."

"Sec. 5. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is inclosed with a good and lawful fence, to prevent such animals from being on said road."

Section 1 of said statute of 1870 reads as follows :

"Section 1. That railroads in this State shall be liable for all damages done to person or property, when done in consequence of any neglect on the part of the railroad companies."

There is no express exception to, or limitation upon, or modification of, the provisions of the foregoing sections by any other statute, and none except such as is found in said section 5 ; and if there is any exception, limitation, or modification of any of the foregoing sections, other than that contained in said section 5, it must be such only as arises by implication, or by judicial construction or interpretation. In other words, under chapter 94 of the statutes of 1874, and upon its face, a railroad company is liable in all cases for injuries done to animals in the operation of its railroad, except where the railroad is inclosed with a good and lawful fence ; and *expressio unius est exclusio alterius*. And upon the face of chapter 93 of the Laws of 1870 a railroad company is liable for "any neglect" on its part which causes injury. The words "any neglect" have been construed to mean "ordinary negligence," and the language of the act does not overturn or destroy, or even disturb, any of the rules of the common law with regard to "contributory negligence." *St. Joseph & D. C. R. Co. v. Grover*, 11 Kan. 302; *Kansas C., F. S. & G. R. Co. v. McHenry*, 24 Kan. 501. In the nature of things, however, there must be some limitations upon the terms of the language used in said chapter 94 of the Laws of 1874. It would be improper for a railroad company to inclose its road where the same crosses a public street or highway ; for such a thing would do violence to other provisions of the statutes of the State. This is also true, even where the place crossed is only a highway *de facto*. *Atchison, T. & S. F. R. Co. v. Griffis*, 28 Kan. 539 ; s. c., 13 Am. & Eng. R. R. Cas. 532.

It has also been held by some of the courts that even a railroad depot or station is of such a public character that it would be improper for a railroad company to fence its road at such place. *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549 ; *Durand v. Chicago & N. W. Ry. Co.*, 26 Iowa, 559 ; *Smith v. Chicago, R. I.*



& P. R. Co., 34 Iowa, 506; *Cleveland v. Chicago & N. W. Ry. Co.*, 35 Iowa, 220; *Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250; *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa, 207; s. c., 9 N. W. Rep. 133; *Galena & C. U. R. Co. v. Griffin*, 31 Ill. 303; *Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143; *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Swearingen v. Missouri, K. & T. R. Co.*, 64 Mo. 73; *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412; *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 510; *Chicago & G. T. Ry. Co. v. Campbell*, 47 Mich. 265; s. c., 7 Am. & Eng. R. R. Cas. 545. And there are other cases which go even beyond this, and hold that a railroad company is not required to fence its road where it adjoins mills or machine-shops, or some other kind of property belonging to the railroad company or to private individuals. *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515; *Ohio & M. Ry. Co. v. Rowland*, 50 Ind. 349; *Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231; *Pittsburgh, C. & St. L. Ry. Co. v. Bowyer*, 45 Ind. 496; *Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593. The great weight of authority, however, is that railroad companies are not absolved from complying with the express terms of the statutes requiring them to inclose their roads with good and lawful fences, except where some paramount interest of the public intervenes, or some paramount obligation or duty to the public rests upon the railroad companies rendering it improper for them not to fence their roads. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427; *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57; *Railroad Co. v. Nebwander*, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; *White Water Valley R. Co. v. Quick*, 30 Ind. 385; *Cleveland, C., C. & L. Ry. Co. v. Crossley*, 36 Ind. 370; *Toledo, W. & W. Ry. Co. v. Chapin*, 66 Ill. 504; *Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250; *Mundhenk v. Central Iowa R. Co.*, 57 Iowa, 718; s. c., 11 Am. & Eng. R. R. Cas. 463; *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 510.

No private interest or convenience or inconvenience, on the part of a railroad company, will alone be sufficient to absolve it from fencing its road where the statute in express terms requires that the road shall be fenced. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Comstock v. Des Moines Val. R. Co.*, 32 Iowa, 376; *Morris v. St. Louis, K. C. & N. Ry. Co.*, 58 Mo. 78; *Bellefontaine Ry. Co. v. Reed*, 33 Ind. 476; *Pittsburgh, C. & St. L. Ry. Co. v. Laufman*, 78 Ind. 319; *Mundhenk v. Central Iowa R. Co.*, 57 Iowa, 718; s. c., 11 Am. & Eng. R. R. Cas. 463. Nor will any private interest or convenience on the part of individuals be sufficient to absolve a railroad company from fencing its railroad in like cases. *Indiana Cent. Ry. Co. v. Leamon*, 18 Ind. 173; *Indianapolis, etc., Ry. Co. v. Thomas*, 84 Ind. 194; s. c., 11 Am. & Eng.



R. Cas. 491; Pittsburgh & L. E. R. Co. v. Cunningham, 39 Ohio St. 327; s. c., 13 Am. & Eng. R. R. Cas. 529; Peoria, P. & J. R. Co. v. Barton, 80 Ill. 72; McKinley v. Chicago, R. I. & P. R. Co., 47 Iowa, 76; Mackie v. Central R. R., 54 Iowa, 540.

The cases last cited have reference to the crossings of railroads over private roads. There are numerous cases holding that railroad companies are required to fence their roads in cities, towns, and villages, except where the railroads cross some public street, alley, or other public place, and where it would be improper to fence the roads, notwithstanding any inconvenience to the railroad companies or to others. Union Pac. Ry. Co. v. Dyche, 28 Kan. 200; Crawford v. N. Y. Cent. & H. R. R. Co., 18 Hun, 108; Brace v. New York Cent. R. Co., 27 N. Y. 269; Ells v. Pacific R. R., 48 Mo. 231; Iba v. Hannibal & St. J. R. Co., 45 Mo. 469; Jeffersonville, M. & I. R. Co. v. Parkhurst, 34 Ind. 501; Toledo, W. & W. Ry. Co. v. Howell, 38 Ind. 447; Indianapolis, P. & C. R. Co. v. Lindley, 75 Ind. 427; Wabash Ry. Co. v. Forsee, 77 Ind. 158; Pittsburgh, C. & St. L. Ry. Co. v. Laufman, 78 Ind. 319; Cleveland & P. R. Co. v. McConnell, 26 Ohio St. 57.

Under the statutes railroads must be "inclosed;" in the language of the statute, they must be "inclosed with a good and lawful fence, to prevent such animals from being on such road." Section 5, c. 94, Laws 1874. Building fences along the sides of the railroad is not alone sufficient. The railroads must be "inclosed," as aforesaid, with fences or other barriers, and whenever for that purpose cattle-guards are necessary at the crossings of public highways or other public places, cattle-guards must be put in. Union Pac. Ry. Co. v. Harris, 28 Kan. 206; Missouri Pac. Ry. Co. v. Manson, 31 Kan. 337; s. c., 2 Pac. Rep. 800; Missouri Pac. Ry. Co. v. Morrow, 32 Kan. 217; s. c., 4 Pac. Rep. 87; New Albany & S. R. Co. v. Pace, 13 Ind. 411; Pittsburgh, C & St. L. Ry. Co. v. Eby, 55 Ind. 567; Bradley v. Buffalo, N. Y. & E. R. Co., 34 N. Y. 427; Tracy v. Troy & B. R. Co., 38 N. Y. 433; Peoria, P. & J. R. Co. v. Barton, 80 Ill. 72; Flint & P. M. Ry. Co. v. Lull, 28 Mich. 511; Cleveland, C., C. & I. R. Co. v. Newbrander, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; Mundhenk v. Central Iowa R. Co., 57 Iowa, 718; s. c., 11 Am. & Eng. R. R. Cas. 463.

"The fact that a railroad crossing is at or near a depot, and that to construct a cattle-guard there would inconvenience the company, will not excuse them from complying with the positive requirement of the statute requiring such protection to be provided." Tracy v. Troy & B. R. Co., 38 N. Y. 433; Bradley v. Buffalo, N. Y. & E. R. Co., 34 N. Y. 427. "Where stock is killed on a railroad-switch at a point where it is unnecessary to keep the road open in order to transact business, the company will be liable with-

out proof of negligence." *Morris v. St. Louis, K. C. & N. Ry. Co.*, 58 Mo. 78; *Comstock v. Des Moines Val. R. Co.*, 32 Iowa, 376.

Upon all the foregoing propositions valuable notes may be found in the American and English Railroad Cases, especially in 7 Am. & Eng. R. R. Cas. 577 *et seq.*; 11 Am. & Eng. R. R. Cas. 496 *et seq.*; and 13 Am. & Eng. R. R. Cas. 533.

In the case of the Pittsburgh, C. & St. L. Ry. Co. *v. Laufman*, 78 Ind. 320, it is said that "the statutory rule is that railroad companies shall be liable for injuries done by their locomotives or cars to animals at places where the roads might be, but are not, fenced; and it is not the province of the courts to create exceptions to the rule or to interfere with legislative policy." This meets with our approval. But whenever it appears from the general course of legislation that the public have a paramount interest in having particular portions of the railroads of the State unfenced, we shall hold that the statutes requiring railroads to be fenced has no application to such places, and that the railroad companies are not required to fence their roads at such places. This exception to the general rule requiring railroad companies to fence their roads will apply to all public highways, including streets and alleys in cities, towns, and villages; and, for the purposes of this case, we shall assume that it will also apply to all railroad depots and stations where the public generally do business with the railroad companies; and yet the roads themselves, or, in other words, the railroad tracks, might very well be fenced at the companies' depots and stations. All the railroad tracks might be located on one side of the depots or stations, and the public have access to such depots or stations from the other side,—the depots or stations forming a part of the inclosure. This would prevent stock from getting on the railroad tracks.

This brings us to the question whether the defendant's railroad should have been fenced where the animal in the present case was killed. The court below, upon the evidence, found that "at Crawford station, in Chase County, Kansas, the defendant owns a strip of land 250 feet wide and 2400 feet long, which is used as its station grounds at that point; . . . that the part of this land upon which the animal was killed was not necessary for the use of defendant as part of its station grounds." In the present case the plaintiff's animal passed from the public highway onto this tract or strip of land used for station purposes, and wandered along the strip until it passed upon the company's right of way and upon the railroad track, where it was killed; and neither the railroad track, nor the right of way, nor the strip of land, was inclosed with a fence. A fence, however, extended along one end and a part of the two sides of this strip of land, but this made the wrong of the railroad company in the present case greater, if it committed any wrong; for, by reason thereof, the animal could not escape from

the passing train. Assuming, for the purposes of this case, that lands necessarily used for station grounds need not be fenced, then the question arises, is it necessary for a railroad company to inclose a track not necessary for the use of the railroad company as a part of its station grounds, but in fact so used? Under the circumstances of this case, we think we must answer this question in the affirmative. To say that railroad companies are not required to fence their roads in such cases would be to create an exception to an express statutory requirement, and to create such exception without any good reason therefor. This does not come within the province of the courts. Courts may say that where some other statute, or some paramount duty or obligation, absolves the railroad companies from fencing their roads, they need not do so; but where the statute expressly requires railroad companies to fence their roads, in order to exempt the companies from liability, and no other statute or paramount obligation or duty or any good reason exists to relieve them from so fencing, the courts cannot say that they need not fence. But if, for any reason, they are relieved from fencing their roads at some particular place or places, then they must construct fences or other barrier as near thereto as is reasonably practicable. *Cleveland, C. & I. R. Co. v. Newbrander*, 40 Ohio St. 15; s. c., 11 Am. & Eng. R. R. Cas. 480; *Morris v. St. Louis, K. C. & N. Ry. Co.*, 58 Mo. 78; *Bradley v. Buffalo, N. Y. & E. R. R.*, 34 N. Y. 427; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Comstock v. Des Moines Val. R. Co.*, 32 Iowa, 376. And if, for any reason, a railroad company is relieved from fencing its road at any particular place, it devolves upon the railroad company to show that it so relieved. The burden of proof in all such cases rests upon the railroad company. *Union Pac. Ry. Co. v. Dyche*, 28 Kan. 200; s. c., 11 Am. & Eng. R. R. Cas. 427; *Indianapolis, P. & C. R. Co. v. Lindley*, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495; *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149; *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 510.

In some States there are express exceptions by statute, as in Illinois, for instance, where railroad companies are not required to fence their roads at the crossings of public roads and highways, or within the limits of cities and incorporated towns and villages; and in some States increased damages by the way of the penalties are imposed for failures to fence, as in Iowa, where the party recovering because of a want of a sufficient fence is entitled to recover double damages. Of course decisions rendered upon such statutes have no application in this State, where no exceptions are found in the statutes, and no damages or penalties are imposed, except the value of the animal killed, or damages for the animals wounded, and an attorney fee.

The plaintiff in this case permitted his animal to run at large, but by so doing we do not think he was guilty of such contributory

negligence as will prevent his recovery. Numerous cases might be cited, but we think it is necessary to cite only a few of them as follows: *Flint & P. M. Ry. Co. v. Lull*, 28 Mich. 511; *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25; *Bellefontaine Ry. Co. v. Reed*, 33 Ind. 477; *Cressly v. Northern R. Co.* (N. H. Sup. Ct.) 15 Am. & Eng. R. R. Cas. 540, and note 544.

The judgment of the court below will be affirmed.

All the justices concurring.

**Implied Exceptions to Fence Laws.**—Although the statutes of the several States require a railroad company in general terms to fence its road, it is not bound to do so at every point. In some States the points at which it is not bound to fence are specified by statute, and in other States the exception is implied. *Burlington, etc., R. Co. v. Davis*, 26 Iowa, 549; *Rogers v. Chicago, etc., R. R. Co.*, 26 Iowa, 558; *Walton v. St. Louis, etc., R. Co.*, 67 Mo. 56; *Indianapolis R. R. Co. v. Oestel*, 20 Ind. 231; *Louisville, etc., R. R. Co. v. Francis*, 58 Ind. 329; *Indianapolis, etc., R. Co. v. Candee*, 60 Ind. 112.

**Obligation to Fence is Question of Law.**—Whether or not a company is bound to fence at a given point is a matter of law to be determined by the court. *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Indianapolis, etc., R. Co. v. Oestel*, 20 Ind. 231; *Illinois, etc., R. Co. v. Whalen*, 42 Ill. 396; *Chicago, etc., R. Co. v. Engle*, 76 Ill. 318.

**Public Places.**—In general where the ground adjoining a railroad is a public place in the actual possession of the public and used in such a manner that the public is constantly passing and repassing over the railroad tracks, there is no obligation on the part of the company to construct a fence. *Trary v. Troy, etc., R. R. Co.*, 38 N. Y. 533; *Brace v. New York, etc., R. R. Co.*, 27 N. Y. 269; *Cleveland, etc., R. R. Co. v. Crossley*, 86 Ind. 371; *Toledo, etc., R. R. Co. v. Chapin*, 66 Ill. 505; *Ewing v. Chicago, etc., R. R. Co.*, 72 Ill. 25; *Cleveland, etc., R. R. Co. v. McConnell*, 26 Ohio St. 57; *Lloyd v. Pacific R. R. Co.*, 49 Mo. 199; *Morris v. St. Louis, etc., R. R. Co.*, 58 Mo. 78; *Swearingen v. Missouri, etc., R. R. Co.*, 64 Mo. 73; *Robertson v. Atlantic & Great Western R. R. Co.*, 64 Mo. 412; *Flint, etc., R. R. Co. v. Lull*, 28 Mich. 510; *McKinley v. Chicago, etc., R. R. Co.*, 47 Iowa, 76; *Indiana, etc., R. R. Co. v. Leaman*, 18 Ind. 173; *Bellefontaine R. R. Co. v. Reed*, 33 Ind. 477; *Pittsburgh, etc., R. R. Co. v. Bowyer*, 45 Ind. 496; *Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471; *Cleary v. Burlington & M. R. Co.*, 11 Am. & Eng. R. R. Cas. 498.

As to what constitutes such a dedication of land to public use as to excuse the company from erecting a fence, or such an abandonment of a public use as to oblige the company to erect a fence, consult the following authorities: *Indiana, etc., R. R. Co. v. Gapon*, 10 Ind. 292; *Jeffersonville, etc., R. R. Co. v. O'Connor*, 87 Ind. 96; *Meyer v. North Missouri R. R. Co.*, 35 Mo. 352; *Gerren v. Hannibal, etc., R. R. Co.*, 60 Mo. 405; *Elliot v. Hannibal, etc., R. R. Co.*, 66 Mo. 683; *Toledo, etc., R. R. Co. v. Cary*, 87 Ind. 172; *Toledo, etc., R. R. Co. v. Howell*, 38 Ind. 447; *Whitewater Valley R. R. Co. v. Quick*, 30 Ind. 384.

**Stations, Grounds, and Approaches.**—A railroad company has been repeatedly held not to be obliged as a rule to fence in the station grounds and approaches, or to inclose land used for switches, side tracks and turnouts. *Davis v. Burlington, etc., R. R. Co.*, 26 Iowa, 550; *Rogers v. Chicago, etc., R. R. Co.*, 26 Iowa, 558; *Durand v. Chicago, etc., R. R. Co.*, 26 Iowa, 559; *Packard v. Illinois R. R. Co.*, 30 Iowa, 474; *Smith v. Chicago, etc., R. R. Co.*, 34 Iowa, 506; *Cleveland v. Chicago, etc., R. R. Co.*, 35 Iowa, 220; *Plaster v. Illinois, etc., R. R. Co.*, 35 Iowa, 449; *Latty v. Burlington, etc., R. R. Co.*,

38 Iowa, 250; Indianapolis, etc., R. R. Co. v. Oestel, 20 Ind. 231; Lloyd v. Pacific R. R. Co., 49 Mo. 199; Swearingen v. Missouri, etc., R. R. Co., 64 Mo. 78; Robertson v. Atlantic, etc., R. R. Co., 64 Mo. 412; Morris v. St. Louis, K. C. & N. R. Co., 58 Mo. 78; Blair v. Milwaukee & P. R. Co., 20 Wisc. 254; Flint & Pere Marquette R. Co. v. Lull, 28 Mich. 510; Chicago, etc., R. R. Co. v. Campbell, 7 Am. & Eng. R. R. Cas. 545; Smith v. Chicago M. & St. P. R. Co., 13 Am. & Eng. R. R. Cas. 534; Kansas City, etc., R. R. Co. v. Hayes, 13 Am. & Eng. R. R. Cas. 597. But see, *contra*, Crawford v. New York Central, etc., R. Co., 18 Hun, 108; Bradley v. Buffalo, etc., R. Co., 34 N. Y. 427; Bellefontaine R. R. Co. v. Reed, 33 Ind. 476.

**Incorporated Cities and Towns.**—As a rule the company is not obliged to construct fences within the limits of incorporated cities or towns. Meyer v. North Missouri R. R. Co., 35 Mo. 352; Edwards v. Hannibal, etc., R. R. Co., 66 Mo. 571; Cousins v. Hannibal, etc., R. R. Co., 66 Mo. 572; Elliot v. Hannibal, etc., R. R. Co., 66 Mo. 688; Davis v. Burlington, etc., R. R. Co., 26 Iowa, 549; Rogers v. Chicago, etc., R. R. Co., 26 Iowa, 558; Illinois, etc., R. R. Co., 27 Ill. 49; Toledo, etc., R. R. Co. v. Spangler, 71 Ill. 568; Chicago, etc., R. R. Co. v. Rice, 71 Ill. 567. But see Coyle v. Chicago, M. & St. P. R. Co., 13 Am. & Eng. R. R. Cas. 526; Wymore v. Hannibal, etc., R. Co., 13 Am. & Eng. R. R. Cas. 524.

**When Railroad Company owns Adjoining Ground.**—The mere fact that the railroad company happens to own the adjoining ground does not exempt it from the obligation to fence the track at that point. Indianapolis, etc., R. Co. v. Oestel, 20 Ind. 231; Jeffersonville, etc., R. R. Co. v. Beatty, 36 Ind. 15.

In England the law is to a contrary effect. Marfell v. South Wales R. R. Co., 8 C. B. (N. S.) 525; Roberts v. Great Western R. R. Corp., 4 C. B. (N. S.) 506.

**Principles of Law applicable when Cattle are Killed at Point where Company is not Bound to Fence.**—When cattle stray upon the track at a point where a railroad company is not bound by law to fence and are killed or injured in consequence, the liability of the company is determined by ascertaining whether or not it has been guilty of negligence. Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Indianapolis, etc., R. R. Co. v. Caldwell, 9 Ind. 398; Indianapolis, etc., R. R. Co. v. McKinney, 24 Ind. 283; Indianapolis, etc., R. R. Co. v. Warner, 35 Ind. 515; Jeffersonville, etc., R. R. Co. v. Huber, 42 Ind. 173; Toledo, etc., R. Co. v. Barlow, 71 Ill. 640; Illinois Central R. Co. v. Bull, 72 Ill. 537; Burlington, etc., R. R. Co. v. Davis, 26 Iowa, 549; Peoria, etc., R. Co. v. Barton, 80 Ill. 72; Jeffersonville, etc., R. Co. v. Underhill, 48 Ind. 389; Schnerr v. Chicago, etc., R. Co., 40 Iowa, 337.

**General Reference.**—A host of authorities bearing upon the questions above discussed will be found cited in the opinion of the case reported above.

LONG

v.

CENTRAL IOWA RY. CO.

*(Advance Case, Iowa. October 23, 1884.)*

A railroad company has no right to fence its tracks where they cross a public street in a city or town, and the owner of an animal killed at such point cannot recover therefor on the ground of the failure of the company to fence.

APPEAL from Hardin circuit court.

Action to recover damages for the killing of a horse by a train of the defendant. There was a trial by jury, and a verdict and judgment for plaintiff. Defendant appeals.

H. E. J. Boardman, J. H. Blair, and A. C. Daly for appellant. No appearance for appellee.

ROTHROCK, C. J.—The right of the plaintiff to recover is based solely upon the failure of the defendant to fence its track, and the question in controversy was whether the defendant had the right to fence its track at the point where the accident happened. The evidence conclusively shows that the engine struck the animal in a public street, in the village of Union. The court instructed the jury as follows: “(5) In determining whether the defendant had a right to fence its road-bed or track at the point where the horse was struck, you are to inquire whether it was suitable, fit, and proper to fence at that point. The defendant would not be required to fence across public streets, nor so as to inclose its depot grounds to the prejudice or injury of the public, or in such a manner as to impair the value of the use of the grounds and road for the purpose for which it was built. If it was not fit, suitable, and proper to build a fence at the point complained of,—that is, if the public convenience, or the ordinary and reasonable use of the grounds by the public and the defendant in the transaction of business with and by the defendant, forbade such fences,—or if a public street was laid out, dedicated, and platted as such, in such a manner as to render it a public highway, so that it would be unlawful for the defendant to fence, and the injury occurred in consequence of such failure to fence, the defendant would not be liable.

Under this instruction, the verdict should have been for the defendant. The plaintiff's counsel make no appearance in this court, and in view of the fact that it is conceded that the horse was struck in a street, we presume they concede there can be no recovery. The only ground upon which any claim can be made that the de-



defendant is liable, is that the street in question had not been opened to public travel. It was, however, a street in an addition to the town, duly platted and recorded, and no one had the right to obstruct it with fences, because it was not in use by the public. The owners of lots in the platted addition would have an undoubted right to insist that the streets should be kept open. If it were lawful for railroad companies to fence up all streets and alleys which have not been opened for public travel, it would materially affect the value of lots upon such streets, and retard the growth of our cities and towns. Reversed.

**Fences at Highway Crossings.**—A railroad company is never bound to fence its track at a point where a public highway crosses it. There is an implied exception to all statutory provisions in this respect. *Flint & Pere M. R. Co. v. Lull*, 28 Mich. 510; *Seward v. Chicago & N. W. R. Co.*, 30 Iowa, 551; s. c., 38 Iowa, 886; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Lafayette & L. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; *Ohio & Miss. R. Co. v. Rowland*, 50 Ind. 349; *Meyer v. North Missouri R. Co.*, 35 Mo. 352; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469; *Atchison, T. & S. F. R. Co. v. Griffin*, 13 Am. & Eng. R. R. Cas. 532.

**Fences at Crossings of Private Ways.**—At the crossing of private ways where the railroad company has the right to fence, it is bound to do so. *McKinley v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 76; *Indiana Central R. Co. v. Leamon*, 18 Ind. 173; *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Indianapolis, etc., R. Co. v. Thomas*, 11 Am. & Eng. R. R. Cas. 491; *Baltimore, etc., R. Co. v. Kriger*, 13 Am. & Eng. R. R. Cas. 602.

**Assent of Landowner to Want of Fence at Crossing of Private Way.**—Unless the landowner requests that the road be kept open or gives his assent to the want of a fence. *Tyson v. K. & D. M. R. Co.*, 43 Iowa, 207; *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295; *Bellefontaine R. Co. v. Suman*, 29 Ind. 40.

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## LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

SKELTON.

(94 *Indiana Reports*, 222.)

To a complaint under the statute for killing the plaintiff's mare, the road not being fenced, etc., it was answered: 1. That the plaintiff was the defendant's servant; that as such it was his duty to keep the railroad track, near a certain station, free from trespassing animals; that, in violation of such duty, he turned his mare out at such a place, near which the track was not fenced, whereby, etc. 2. That a certain station was a public place, with side-tracks and switches where large shipments of goods were made and received, and that plaintiff turned his mare loose in that immediate vicinity, and she went upon the track at a place where it was not securely fenced, etc.

*Held*, that both paragraphs were bad on demurrer; the first, for not aver-

ring that the place where the animal entered upon the track and was killed, the employee was required by contract to keep off trespassing animals, and the second, for failure to show that the animal was killed at the station, where no fence was required.

FROM the Washington Circuit Court.

D. M. Alspaugh and J. C. Lawler for appellant.

S. B. Voyles and H. Morris for appellee.

HAMMOND, J.—Action to recover for the value of a mare killed upon the appellant's railroad at a place where it was not securely fenced. Answer in three paragraphs, to the second and third of which the appellee's demurrer was sustained for want of facts.

Trial by the court; finding and judgment for the appellee. Errors are assigned that the complaint does not state facts sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer to the second and third paragraphs of the appellant's answer. No objection is urged to the complaint in the appellant's brief, and we discover no defect in it. The second and third paragraphs of the answer are as follows:

"2. For further answer to the complaint, said defendant says that at the time the said mare was killed by the engines and cars as alleged, the said plaintiff was in the employ of the defendant, and was the agent and servant of the defendant, and that said agent's place of business and duty as such servant and employee were at and in the vicinity of defendant's depot at Farrabee's Station, on said railway, in said county; that as such agent and servant it was the duty of plaintiff to oversee and keep the defendant's railway and switches at and near said station free of all obstructions and trespassing animals, and to save the defendant and the travelling public, in so far as he could, from accident and loss by reason of such obstructions and trespassing animals; that said plaintiff, in violation of his said duty as such agent and servant, and well knowing the premises, and the danger to other employees of said company and to passengers travelling on the cars of said company, did knowingly and wilfully turn his said mare loose in the immediate vicinity of defendant's said railway track at a place where the same was not securely fenced in, and negligently and carelessly permitted his said mare to wander and go upon said railway, where she was killed. Wherefore defendant demands judgment.

"3. Defendant for further answer says that plaintiff's said mare was killed, as alleged, in the immediate vicinity of Farrabee's Station on defendant's said railway; that said station is a public place; that large lots of goods, lumber and merchandise are shipped by defendant's cars to and from said station; that said defendant has side-tracks and switches there, and that such tracks and switches

are necessary for the transaction of the defendant's business at said station; that the plaintiff resides at said station and has resided there for more than ten years last past, and has during said time been in the employ of said company at said point, and at and long before the killing of said mare was familiar with the running of the trains over said road, and knew the time when said trains were to arrive and depart from said station; but, notwithstanding the knowledge of said plaintiff in regard to said facts, he turned his mare loose in the immediate vicinity of said station, and at a point along and near said railway where the same was not securely fenced in, and negligently and carelessly permitted her to wander and go upon the track of said railway, at or near said station, where she was killed. Wherefore defendant prays judgment."

In an action against a railroad company for killing stock where its road is not securely fenced, it is no defence to the action that the plaintiff's negligence contributed to the injury. *Louisville, etc., Ry. Co. v. Whitesell*, 68 Ind. 297. The fact, therefore, that the appellee's negligence in turning his mare loose near the railway track resulted in her going upon the road where she was killed, does not prevent a recovery in his favor.

It has been held by this court that where, by contract with a railroad company, the owner of land through which it passes has undertaken to maintain a fence, no recovery can be had by him for an injury to his animal resulting from his failure to perform his contract, without proof that the company was guilty of negligence. *Terre Haute, etc., R. R. Co. v. Smith*, 16 Ind. 102; *Indianapolis, etc., R. R. Co. v. Shimer*, 17 Ind. 295; *Indianapolis, etc., R. R. Co. v. Petty*, 25 Ind. 413. It would seem, from the principle announced in the above cases, that if it is the duty of an employee, by virtue of his contract with a railroad company, to keep trespassing animals off a certain part of the railway track, he ought not to recover for an injury to his own animal occurring through his failure to comply with his agreement. But the second paragraph of appellant's answer, in which such a contract with the appellee is attempted to be set up, fails to aver that the appellee's mare entered and was killed upon that part of the track where his contract required him to keep off trespassing animals. It is charged that he turned his mare loose in violation of his duty. But this is a mere conclusion. The facts out of which the duty arose should have been stated, showing how and in what respect the act upon his part complained of conflicted with the terms of his employment.

The facts stated in the third paragraph of the answer were sufficient to show that the appellant was excusable for not fencing its road at Farrabee's Station; but the averments that the appellee turned his mare loose in the immediate vicinity of that station, and carelessly and negligently permitted her to wander and go upon the track of the railroad at or near said station, where she was killed,

do not show that the injury occurred at said station where the appellant was not required to fence its road. Besides, the appellant might have shown, under its general denial, that it was not legally bound to fence its road where the animal entered upon the track and was killed. The error, therefore, in any event, of sustaining a demurrer to the third paragraph of the answer, was harmless. *Jeffersonville, etc., R. R. Co. v. Lyon*, 55 Ind. 477.

The demurrers to the second and third paragraphs of the answer were rightly sustained.

Affirmed, with costs.

**Fences at Station Grounds.**—As to whether a railroad company is or is not bound to fence its station grounds, see *Chicago, Milwaukee & St. P. R. Co. v. Dummer*, and note, *infra*.

## CHICAGO, MILWAUKEE AND ST. PAUL R. R. Co.

v.

DUMMER.

(108 *Illinois Reports*, 402.)

Under the police power the State has the undoubted right to require all railway corporations to inclose their roads with a suitable and sufficient fence, as a matter of public safety. Such regulations tend to the safety of persons and property, and are for that reason lawful.

In what manner and to what extent railway corporations shall be required by law to inclose their tracks, and where it shall be done, would seem to be ordinarily within legislative discretion.

The statute requiring railway corporations to fence their tracks having excepted certain places, as public road crossings, and within such portions of cities and incorporated towns and villages as are or may be laid out and platted into lots and blocks, etc., this court is not disposed, if it has the power, to extend the exception to cases not enumerated, as a matter of law, without proof of facts showing a necessity for relieving such corporation from this duty.

Where a railway corporation has a station at a place on its road where trains stop to receive and discharge passengers and freight, which is not in a city or incorporated town or village, laid out and platted into lots and blocks, and has side-tracks at such station, this court cannot, as a matter of law, hold that it is exempted from fencing its track at such station; and if stock gets upon its track for want of such fence, and is killed, the corporation will be liable to the owner for the injury.

The law is well settled, that when no reason arising from public necessity exists for keeping a railway track open at any given point, whether within or without the corporate limits of a city or village, all railroad corporations must conform to the statute, and fence their tracks, or answer for damages that may result from the omission of that duty. If the courts can relieve from this duty, the evidence must present facts showing a great public necessity for not fencing the track at the particular place.

Where a statute is expressed in clear and precise terms, and its sense is

manifest, and it leads to nothing absurd, or where its provisions, if literally applied, will work no palpable injustice, nor contravene any imperative public exigency, there is no reason for not adopting the sense it naturally presents, and it should be enforced as it is plainly written.

APPEAL from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Kane County.

This action was commenced by Margaret Dumser, before a justice of the peace, against the Chicago, Milwaukee & St. Paul R. R. Co., to recover the value of a cow killed by the cars or engine on defendant's road. On the trial before the justice of the peace plaintiff recovered a judgment against defendant. On the appeal of defendant a trial *de novo* was had in the circuit court, where plaintiff again recovered a judgment. This latter judgment was affirmed in the Appellate Court for the Second District. A majority of the judges of the Appellate Court having certified that in their opinion the case involves questions of law of such importance, on account of principal and collateral interests, as that it should be passed upon by the Supreme Court, defendant brings the case to this court on its further appeal. The judges of the Appellate Court also certify the ground of granting the appeal, which is, the "great importance of having a decision of the Supreme Court upon the question as to whether, under the existing laws of Illinois, a railway corporation is obliged to fence the depot grounds and switch limits at all stations, except at the crossings of public roads and highways, and whether such portions of cities and incorporated towns and villages as are or may be laid out and platted into lots and blocks, etc., as appear, only required by section No. 1 of the act in relation to fencing and operating railroads, approved March 31, 1874."

D. S. Wegg and Edward C. Lovell for the appellant.

D. B. Sherwood for the appellee.

SOOTH, J.—No negligence is imputed to defendant in respect to the accident that resulted in injury to plaintiff's property, unless it was the omission to fence its track at the point where the animal was killed. Section 1 of the act of 1874, in relation to "fencing and operating railroads," as amended by the act of 1879, makes it the duty of every railway company, within six months after any part of its line is open for use, to erect, and thereafter maintain, fences on both sides of its road, or so much thereof as is open for use, suitable and sufficient to prevent the ordinary farm stock from getting on such railroad, "except at crossings of public roads and highways, and within such portions of cities and incorporated towns and villages as are, or may hereafter be, laid out and platted into lots and blocks." Provision is made for gates or bars at farm crossings, and it is also made the duty of such corporations, where the

same has not been done, to construct, and thereafter maintain, suitable and sufficient cattle-guards at all road crossings. Any failure to comply with the provisions of the statute in this respect will subject the company to the payment of all damages which may be done by the "agents, engines, or cars" of such corporation, to cattle, horses, sheep, hogs, or other stock. The only question made is, whether plaintiff's cow was killed at a point or place where it was the duty of the defendant railway company to inclose its track with a suitable and sufficient fence to prevent stock from getting on it. The question raised is purely one of law, and involves a construction of a section of the statute in regard to "fencing and operating railways" not heretofore considered by this court.

The point where plaintiff's cow was killed was eighty rods east of a station on defendant's road called "Dumser," but west of the east end of a switch at that station. It is admitted "Dumser" is not an incorporated city, village, or town, and has never been laid out and platted into lots and blocks, and neither is it a city or village in fact, but defendant has a station-house at that point, and stops its trains there for receiving and discharging freights and passengers. There is a switch at this point about two thousand feet long, and extends on both sides of the station-house, about one third on west and two thirds on east of the station. The value of the cow killed was agreed upon, and also that defendant had been operating its road more than six months prior to the accident, and that it had no fence on the north side of its track, where the cow got upon the track or was killed.

It is not claimed the point where the cow was killed is one of the excepted places mentioned in the statute, where the company is not required to fence its track. As has been seen, it was not within the limits of any city or village, nor had the ground been platted into "lots or blocks." The argument is, that as the company had a station at the place where the injury was done,—where it stopped its trains to receive and discharge freights and passengers,—a public necessity arises for keeping the grounds adjacent to the depot open, and for that reason it could not have been the intention of the legislature the company should fence its track at such a place. The legislature has seen fit, in absolute terms, to limit the exceptions to the statutory requirement that all railway companies shall inclose their tracks with a suitable and sufficient fence, to the "crossings of public roads and highways," and to such portions of cities and villages as have been, or shall hereafter be, laid out and platted into "lots and blocks," and the courts would be reluctant to enlarge, by construction, the number of excepted places,—most certainly, unless where the literal application of the statute would work such great public inconvenience it would be held the legislature could not have intended it should apply. It is conceded that under the police power the State has



the undoubted right to require all railway corporations to inclose their roads with a suitable and sufficient fence as a matter of public safety. Such regulations tend to the security of persons and property, and are, for that reason, lawful. In what manner and to what extent railway corporations shall be required by law to inclose their tracks, and when it shall be done, would seem to be ordinarily within legislative discretion.

A statute of the State of Indiana gave the owner of stock killed on a railway a right of action against the company, without regard to the question whether such injury was the result of wilful misconduct or negligence, or the result of unavoidable accident. It was, however, provided the act should not apply to any railroad securely fenced in, and such fence properly maintained by such company. Although this statute is general, and contains no exception, it was held in *S. & Ind. R. R. Co. v. Shimer*, 6 Ind. 141, the legislature did not intend to authorize railroad companies to inclose streets in a town against the use of the public, and that a literal construction of the statute would lead to an absurdity. In that case the animal was killed within the corporate limits of the town of Lafayette, at a place where the railroad track crossed one of the streets of the town, and it was ruled it would not have been lawful to erect a fence at that point, and that the want of such fence was not the cause of such accident. In the case of *Ind. & Cin. R. R. Co. v. Kinney*, 8 Ind. 402, it was held, under the same statute cited in *S. & Ind. R. R. Co. v. Shimer*, a railroad company would not be liable for stock killed or injured at a place on their road where a fence ought not to be erected, unless the injury was negligently or wilfully done, and that an open space in front of a mill standing within fifty feet of the track is such a place. In the case of *Ind. & Cin. R. R. Co. v. Parker*, 29 Ind. 471, it was held, as in the other cases cited, the statute did not apply to injuries done at a point where it would be illegal or improper for the railroad company to maintain fences, such as road and street crossings, but that it was not every place within the corporate limits of a town or city that is within the exception. The exception allowed would be as to places where it would be improper to fence the track, whether within or without the corporate limits of cities or villages. In construing their own statute on the same subject, and which is not unlike the Indiana statute, in *F. & P. M. R. R. Co. v. Lull*, 28 Mich. 510; s. c., 7 Am. & Eng. R. R. Cas. 505, the court thought the rule established by the case last cited was a satisfactory one,—that it expressed the limits of the exceptions arising under the statute accurately, and a track within the corporate limits of a city or town, at a point where no reason arising from public necessity existed for keeping it open, was as much within the statute as a track elsewhere. It seems the courts of Missouri and Iowa have followed closely the rule established by the cases *ut supra*, in con-

struing similar statutes on the same subject. *Lloyd v. Pacific R. R. Co.*, 49 Mo. 199; *Davis v. B. & M. R. R. Co.*, 26 Iowa 549; *Cleveland v. C. & N. W. R. R. Co.*, 35 Id. 220. It will be seen it is held by these courts, that notwithstanding the statute makes railroad corporations liable for injuries done to stock unless their tracks are inclosed with suitable fences, yet they are not bound to fence their tracks at places where it would be improper to do so on account of the great public inconvenience it would occasion, and hence are not liable because of the omission, unless guilty of negligence or wilful misconduct in regard to the accident that caused the injury. The reason for the rule adopted in such cases is well stated in *The People v. Davenport*, 91 N. Y. 574, where it is said, a "principle of construction of universal authority is that which requires the court to limit and restrict the operation of a statute, when its language, if applied in its literal sense, would lead to an absurdity or manifest injustice." The same rule of construction had been previously adopted by this court in *Perry County v. Jefferson County*, 94 Ill. 218. On the other hand, the law is equally well settled that where no reason arising from public necessity exists for keeping it open at any given point, whether within or without the corporate limits of a city or village, all railroad corporations must conform to the statute, and fence their tracks, or answer for damages that may result from the omission of that duty.

It will be noticed the statute of this State in relation to fencing railroads is more definite in its provisions than that of any other State on the same subject to which the attention of the court has been called. In the statutes construed in the cases cited, no exceptions to the general provision the railroad track shall be inclosed seem to be enumerated; but in this State the excepted places are stated to be at "crossings of public roads and highways," and within such portions of cities and incorporated towns and villages as are, or may hereafter be, laid out and platted into "lots and blocks." This is a clear legislative expression as to what places the public convenience demands a railroad track shall be kept open. While this expression of the legislative will may not absolutely forbid any further restrictions as to the application of this statute as it is written, there are many cogent reasons why the courts would hesitate to go further than the legislature has done, and other points will not be deemed excluded from the general provisions of the statute, unless for the most satisfactory reasons. It often happens expressions used in statutes are to be regarded as restrictive, and are intended to exclude all things not enumerated. And so in the construction of statutes, as well as deeds and other written instruments, the maxim, *expressio unius, est exclusio alterius*, is of frequent application, and often assists to arrive at the intention of the legislature, which it is always desirable to do.

But at all events, where a statute is expressed in clear and precise terms, where the sense is manifest, and leads to nothing absurd, or where its provisions, if literally applied, would work no palpable injustice, nor contravene any imperative public exigency, there can be no reason not to adopt the sense it naturally presents. In such cases there can be no necessity for restricting its operation, and the statute should be enforced as it is plainly written. *Newell v. The People*, 7 N. Y. 9; *Potter's Dwaris*, 145.

The validity of this statute as a police regulation is not doubted, but it is attempted to make an exception to its general provisions—which it is conceded the legislature has not done—that would relieve a railroad corporation from the duty to fence its track at a depot located on ground not platted into lots and blocks, and at a point where there is in fact no city or village, for the reason the public convenience requires the track to be kept open at such a place. This, it is thought, cannot be done,—certainly not on the record now before this court. There is nothing in the evidence in this case that shows any reason, arising from public convenience or otherwise, that requires the track either east or west of this station-house should be left unfenced. That necessity, if it existed at all, should be made to appear from the evidence by the defendant corporation seeking to be relieved from a duty imposed by a public statute. In the absence of proof it will be presumed the reasons which, in the opinion of the legislature, required railroad tracks to be inclosed with suitable fences to prevent injury to stock, applied here as well as elsewhere. It might be the depot building and platform could be so constructed as to constitute an effectual bar to the approach of stock to the track as a fence would do, and still the front of such building be open to receive and discharge passengers and freights through the building and over the platform, without serious inconvenience to the number of persons that might have occasion to go to or transact business at a country station, as this is. Nothing to the contrary is shown, and no presumptions will be indulged in favor of a party seeking to be relieved from a duty imposed by law, for politic reasons.

But there is another reason why the present judgment should be affirmed. It is agreed it shall not be material where the cow got upon the track, except it was between the switches at "Dumser" station, but that it was killed about eighty rods east of the depot, and that defendant had no fence on either side of its track at that point, which was within the switch limits. Between the depot building and the place where the cow was killed a public highway crosses the railroad grounds and the tracks, from north to south, which highway was not protected by cattle-guards. It is also admitted defendant had no fence on the north side of its track, where the cow got upon the track or was killed. The evidence does not show at what point the cow got on the track, nor whether it came

from the north or the south; but as plaintiff's pasture lands lie north of the track, it is most probable the cow came upon the track from that direction. It may be the cow got on the track at or near the point where it was killed. If it should be conceded the public convenience required the track in the immediate vicinity of the depot building should be kept open, it cannot be held as a matter of law, in the absence of any testimony as to the fact, that a like public necessity required the track should not be fenced on either side for a distance of a quarter of a mile at a country station. The fact a switch may extend that far can make no difference. It could be inclosed with a suitable fence as well as the main track.

In any view that can be taken the judgment is warranted by the law and the evidence, and must be affirmed.

Judgment affirmed.

SCHOFIELD and CRAIG, JJ.—To the extent that this opinion may be regarded as holding that the law imposes the obligation upon railroad companies of fencing their tracks at such points as stations are located, although not within the limits of incorporated cities and villages, we do not concur in it.

**Fencing Station Grounds.**—Upon the question as to whether or not a railroad company is under any statutory obligation to fence its station grounds, see the following authorities: *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Swearingen v. Missouri*, etc., R. Co., 64 Mo. 73; *Robertson v. Atlantic*, etc., R. Co., 64 Mo. 412; *Indianapolis*, etc., R. Co. *v. Oestel*, 20 Ind. 231; *Galena*, etc., R. Co. *v. Griffin*, 81 Ill. 303; *Packard v. Illinois*, etc., R. Co., 30 Iowa, 474; *Davis v. Burlington*, etc., R. Co., 26 Iowa, 549; *Rogers v. Chicago*, etc., R. Co., 26 Iowa, 558; *Durand v. Chicago*, etc., R. Co., 26 Iowa, 559; *Cleveland v. Chicago*, etc., R. Co., 35 Iowa, 220; *Smith v. Chicago*, etc., R. Co., 34 Iowa, 506; *Plaster v. Illinois*, etc., R. Co., 35 Iowa, 449; *Latty v. Burlington*, etc., R. Co., 38 Iowa, 250; *Chicago*, etc., R. Co. *v. Campbell*, 7 Am. & Eng. R. R. Cas. 545; *Pittsburgh C. & St. L. R. Co. v. Crandall*, 58 Ind. 365; *Ohio R. Co. v. Rowland*, 50 Ind. 354; *Flint & Pere Marquette R. Co. v. Lull*, 28 Mich. 510; *Smith v. Chicago, M. & St. P. R. Co.*, 18 Am. & Eng. R. R. Cas. 534; *Schooling v. St. Louis, K. C. & N. R. Co.*, 13 Am. & Eng. R. R. Cas. 536; *Louisville, N. A. & C. R. Co. v. Skelton*, 94 Ind. 222; s. c., *supra*; *Greely v. St. Paul, M. & M. R. Co.*, *infra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO RT. Co.

v.

SHANKLIN.

(94 *Indiana Reports*, 297.)

In a complaint against a railway company, for killing stock, it is sufficient to allege, on that point, that the place where the stock entered upon the track "was not fenced."

A want of certainty as to time, in such complaint, is reached by motion to make specific, and not by demurrer.

Where, in such action, the defendant answers that it could not fence at the point where the stock entered on its track, because of a public highway crossing there, and there was evidence tending to show a previous abandonment of such highway, it was proper for the court to instruct the jury that if, at such point, such highway had been abandoned for over thirty years, it would be the same as though it had never existed.

As to instructions concerning the burden of proof upon each party, and as to the company's duty to fence, see opinion.

If there be room to erect a fence between a railroad and an adjoining parallel highway, the railroad company is lawfully bound to fence.

From the Montgomery Circuit Court.

A. D. Thomas and E. V. Brookshire for appellant.

G. W. Paul and J. E. Humphries for appellee.

BICKNELL, C. C.—The appellee brought this action against the appellant to recover the value of two horses killed by the appellant's train of cars on the line of its railway.

A demurrer to the complaint, for want of facts sufficient, was overruled. The defendant answered in two paragraphs: 1. The general denial. 2. That at the place where the horses entered upon the railway the defendant could not lawfully fence its road, because there was a public highway there. The plaintiff replied, denying the second defence. The issues were tried by a jury, who returned a verdict for the plaintiff for \$275; they also returned with their verdict interrogatories and answers thereto, which interrogatories they were required by the court, on motion of the defendant, to answer. The defendant moved the court to require the jury to answer interrogatory No. 3 more fully. This motion the court overruled. The defendant moved for a new trial. This motion was overruled; judgment was rendered on the verdict; the defendant appealed. The following errors are assigned:

1. Overruling the demurrer to the complaint.

2. Overruling the motion for a new trial.

The complaint alleged that "where said horses got upon said

track of defendant's railroad; the said track of said road was not fenced."

The appellant claims that the allegation should have been that the track was "not securely fenced," and that some day should have been named as the time when the road was not fenced.

These objections cannot be sustained. The language of the statute, "not securely fenced," comprehends cases where there is no fence, and if the complaint was not sufficiently specific as to time, such a defect is not reached by a demurrer, but by a motion to make more specific. *Ohio, etc., Ry. Co. v. Collarn*, 73 Ind. 261.

The following were the reasons for a new trial:

1. The verdict is not sustained by sufficient evidence, and is contrary to the evidence.

2. The verdict is contrary to law.

3. Error in giving each of the instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, asked for by the plaintiff, and each of the instructions numbered 1, 2, 3, 4, and 5, given by the court of its own motion, and in refusing to give instruction No. 11, asked for by the defendant.

4. Error in refusing to require the jury to answer more fully interrogatory numbered 3.

The fourth of these reasons for a new trial is not discussed in the appellant's brief, and is, therefore, regarded as waived.

The first four of the instructions, given at the request of the plaintiff, stated, in substance, that a public highway may be abandoned by the public in whole or in part, and thereby may cease to be a highway in whole or in part, and that if, at the place where the plaintiff's horses went upon the railway, there had once been a public highway, which had been abandoned by the public for over thirty years, then it would stand as if it had never been a highway. There was evidence to which these instructions were applicable, the chief controversy being whether there was a public highway where the horses went upon the railway. There was no error in these instructions. *Jeffersonville, etc., R. R. Co. v. O'Connor*, 37 Ind. 95.

The other instructions, given at the request of the plaintiff, relate to the duty of the defendant to fence its road. They state, in substance, that the burden of proof is on the plaintiff to show that the road was not fenced, and on the defendant to show that it was not bound to fence its road at that point; that a railroad company is not liable in such an action as this, if its road ought not to be fenced at the point in question, and is not bound to fence its road at highway crossings, nor at any place where such fencing would interfere with the rights of the public, or the proper management of the business of the railroad; and that if there is a highway running parallel with the railroad, then, if the defendant could have so fenced its road without such interference, by putting



the fence even upon its own reservation, or by making cattle-pits at the proper places, it might be liable in an action of this kind if it had no such fence or cattle-pits.

We find no error in any of the instructions given by the court at the request of the plaintiff. *Wabash Ry. Co. v. Forshee*, 77 Ind. 158, and cases there cited. The appellant in its brief does not point out any error in the instructions given by the court of its own motion; therefore this part of the third reason for a new trial must be regarded as waived.

The eleventh instruction asked for by the defendant was refused. It was as follows, substantially: If the defendant's track and right of way, and the incidents thereof, occupied the whole of the public highway, still the easement of the public would remain, and the public having the right to use such easement, the defendant could not lawfully fence its track so as to fence the public out from the right to use said easement. There was no error in refusing this instruction, so far as it asserted the rule that where the public have an easement the railway company cannot obstruct such easement by fencing its road. That had already been more clearly asserted in the instructions previously given. We find no error either in giving or refusing instructions.

The first and second reasons for a new trial are, that the verdict is not sustained by the evidence, and is contrary to law.

It appeared in evidence that going southward from the town of Linden there was once a highway, leading from Crawfordsville to Lafayette, and that upwards of thirty years ago the defendant was authorized by the proper county commissioners to take said highway for the site of its road for about two miles south of Linden, and about that time built its track upon the centre of said highway throughout said two miles, and has occupied the same ever since. There was evidence tending to show that such occupation made the highway impracticable, by reason of cuttings and filling and ditches, and because in some places the railroad occupied more than the entire width of the old highway, and there was evidence that the public had abandoned said two miles of highway many years ago, and had built another highway in its stead, about a mile westward, and that at the north end of the old highway a fence had been put across it, at the western end of which Mr. White, the owner of the land, had erected and maintained for his own convenience a private gate, through which he was in the habit of passing to some fields of his below; that some of the neighbors whose lands adjoined the railroad would occasionally travel along the railroad on foot and on horseback and with wagons, through White's gate, but not with buggies, owing to the roughness of the way, and that there was a wagon track along the railroad which began at the south end of said two miles, and went northward to White's gate, crossing the railroad four times, the last time

about half a mile south of White's gate, and it was shown that the horses entered upon the railroad track, on the west side of it, between White's gate and the first crossing of the wagon track below the gate, and there was evidence tending to show that even if this wagon track were a public highway there was ample room to fence between it and the railroad all the way from White's gate to said first crossing of the wagon track south of the gate, and that such fence, with a cattle-pit at the crossing, would furnish complete protection. The evidence, however, did not show that this wagon track was a public highway.

The jury, in answer to one of the interrogatories, had stated that the highway had been abandoned by the public, and that a gateway had been erected and used as aforesaid. No objection was made, alleging that this answer was not sustained by the evidence. There was evidence tending to sustain the verdict in every essential point; therefore it cannot be disturbed. *Cooper v. Robertson*, 87 Ind. 222. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

**PER CURIAM.**—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant. See *Louisville R. R. Co. v. Shanklin*, and note, *infra*.

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**LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.**

*v.*

**SHANKLIN.**

(98 *Indiana Reports*, 578.)

Where the evidence shows that the county commissioners gave permission to a railroad company to occupy a highway, and it has done so for thirty years, the cuts and fills at some places covering the entire way; and during that time the public authorities have exercised no supervision over the way, and the public have not usually travelled over it, the jury are justified in finding that the highway, as such, has been abandoned, and that the company should maintain fences.

An instruction, that if the company can fence its road, without interfering with the rights of the public or the management of its road, it is bound to do so, is not erroneous, as against the company.

The court cannot be asked to cover the whole case in a single instruction. Instructions should be considered as a whole.

Indefiniteness in a pleading is reached by a motion, but not by a demurrer for want of facts.

FROM the Montgomery Circuit Court.

A. D. Thomas for appellant.

G. W. Paul and J. E. Humphries for appellee.

**ZOLLARS, C. J.**—The evidence tends to show the following facts: About thirty-five years ago, a certain public highway leading from Crawfordville to Lafayette was graded for a macadamized road. In 1849, after the grading had been partially or wholly completed, the Crawfordville & Lafayette R. R. Co., upon application to the board of county commissioners of Montgomery County, was granted permission to occupy that portion of the highway which was in Montgomery County as a right of way for its railroad track. Soon after, the railroad was built, and from that time to this, the railroad company, and its successor, the appellant, have occupied the highway for the uses and purposes of a railroad. A portion of the highway, two miles and more in length, so occupied, extends from the town of Linden to what is known as Murphy's Crossing. About a quarter of a mile south of Linden the railroad is crossed by a public highway. At this crossing the railroad company, for at least twenty years, has maintained a cattle-pit and wing fences, leading from the track to fences on either side of the railroad. During that time there has been a gate in the wing fence on the west side of the track, through which persons and teams might pass to and from the grounds of the old highway and railroad.

Many years ago the adjoining farm-owners built fences on either side of the strips of land so occupied by the railroad, and have since maintained them. Some of these fences seem to have been built before, and some subsequent to, the construction of the railroad. Whether these fences have been maintained generally, upon the line of the old highway, is not made certain by the evidence. It is made reasonably certain, however, that at some points they could not be upon that line. Notwithstanding the occupancy by the railroad company, and the gate above mentioned, during all the time since the construction of the railroad, people have occasionally passed through the gate, and from that point to Murphy's Crossing, between the fences so maintained by the farmers. Between these points there is and has been a beaten way, parallel with, and partially on either side of, the railroad. Over this way it is difficult to pass with wagons and other vehicles, and impossible in wet seasons. At some points the cuts and fills of the railroad occupy and have occupied the whole of the old highway. At these points the travelled way, above mentioned, of necessity is and has been outside the boundaries of the old highway, and hence at these points the farm fences, which are farther from the railroad than the travelled way, necessarily are, and have been, outside the boundaries of the old highway.

The evidence tends very strongly to show that at other points the fences are and have been outside the limit of the old highway, as at the gate and for some distance south of it. These fences have

been moved several times. There has been nothing like a general use of this way by the public.

It has been, rather, occasional. The farmers living upon the way between these points have not used it generally in marketing the products of their farms. There is no evidence that the public authorities have exercised any supervision at all over it, by work or otherwise.

The order of the board of commissioners gave full authority to the railroad company to occupy the whole of the old highway, if it chose to do so. For more than thirty years the company has occupied the highway, at some points the fills and cuts covering the whole of it. In that occupancy the people and the authorities have acquiesced, in no case, so far as shown by the evidence, disputing the right or undertaking to exercise the supervision or authority given by law over public highways.

Upon the evidence, a synopsis of which we have given, the jury were justified in finding that the highway thus occupied by the railroad company had been abandoned as a highway, and that the railroad might have been fenced. We cannot, therefore, reverse the judgment upon the weight of the evidence. *Jeffersonville, etc., R. R. Co. v. O'Connor*, 87 Ind. 95.

The facts of this case, as presented in the record, are, in every essential particular, the same as in the cases of *Louisville, etc., Ry. Co. v. White*, 94 Ind. 257; s. c., 19 Am. & Eng. R. R. Cas. *Louisville, etc., Ry. Co. v. Shanklin*, 94 Ind. 297; s. c., *supra*; and *Louisville, etc., Ry. Co. v. Pixley*, 94 Ind. 608; s. c., 19 Am. & Eng. R. R. Cas., where it was held that the juries were justified in finding that the old highway had been abandoned, and that the company is bound to maintain fences.

This case, on the contrary, is not the same as the cases of *Louisville, etc., Ry. Co. v. Francis*, 58 Ind. 889, and *Louisville, etc., Ry. Co. v. Wyson*, 58 Ind. 597, and the case of *Croy v. Louisville, etc., Ry. Co.*, 97 Ind. 126,—s. c., 19 Am. & Eng. R. R. Cas.,—in which cases it was held that the evidence failed to show an abandonment of the old highway.

It is said in argument that those cases involved the locality involved here. Conceding this, a fact we cannot determine from reading those cases, the evidence is not the same. It is our duty, of course, to rule upon each case as it comes before us. These rulings do not involve a contradiction, for the reason that each case was correctly ruled upon the facts in the record.

Appellee's horse entered through the gate, which, much of the time, has been left open, and having passed down the track for about a quarter of a mile, was there killed by one of appellant's trains.

It is argued that the second and eighth instructions were erroneous, in that they related to the law and rules to govern the jury

in determining as to whether or not there had been an abandonment of the highway, there being no evidence to show such an abandonment. In holding that there is evidence tending to show such abandonment, we have disposed of this argument. See *Louisville, etc., Ry. Co. v. Shanklin, supra*.

In the third and fourth instructions the court charged the jury that if the company could fence its road without interfering with the rights of the public or the management of its road, it was bound to do so.

The objection urged against these instructions is, that they involve an implication that the company might fence in a public highway. This is not well taken.

In other instructions, the question as to whether or not there was a public highway where the horse entered upon the grounds and track and was injured, was left to the jury to decide; and in an instruction asked by appellant, and given by the court, the jury were charged that if there was such highway, the company was not bound to fence.

The sixth instruction given by the court is a general instruction that railroad companies are liable for the killing of animals if they enter upon the track and are killed at a point where the company might, but have neglected to fence.

It is contended by appellant's counsel that this instruction ignored the defence that there was a public highway, at the point where appellee's horse entered and was killed. This instruction does not cover the whole case, as no one instruction could well do. It must be considered with the other instructions, in which the jury were very fully and fairly instructed upon every branch of the case.

Appellant submitted thirteen instructions, all of which were given, except one. A large number of these were very favorable to appellants.

It is argued that the complaint is not good, because it is not made certain by the averments at what time the road was not fenced, and that hence the demurrer for want of facts should have been sustained. In the first place, such a defect would not be reached by the demurrer. *Louisville, etc., Ry. Co. v. Shanklin, supra*. In the second place, the complaint is sufficiently certain. It is averred that on the 10th day of August, 1882, the horse went upon the track and was killed, and that at the place where it got upon the track and was killed, the road was not fenced. This clearly fixes the lack of a fence at the time of the entry.

Judgment affirmed, with costs.

**Fencing at Points Used by Public.**—Although it is true as a general principle that a railroad company is not bound to fence its track at a point where the adjoining land is generally used by the public, this principle will not apply where there has been an abandonment of the public use. *White-*

water Valley R. Co. v. Quick, 80 Ind. 884; Toledo, etc., R. Co. v. Cary, 87 Ind. 172; Toledo, etc., R. Co. v. Howell, 88 Ind. 447; Jeffersonville, etc., R. Co. v. O'Connor, 87 Ind. 96. But see Indiana, etc., R. Co. v. Gapen, 10 Ind. 292; Meyer v. North Missouri R. Co., 85 Mo. 352; Elliott v. Hannibal, etc., R. Co., 66 Mo. 688.

**Highways Running Parallel with Railroad Track.**—A railroad company is bound to fence its road at a point where it runs alongside of and parallel to a railroad track. Indianapolis, etc., R. Co. v. Guard, 24 Ind. 222; Indianapolis, etc., R. Co. v. McKinney, 24 Ind. 283; Jeffersonville, etc., R. Co. v. Sweeney, 82 Ind. 480; André v. Chicago, etc., R. Co., 30 Iowa, 107; Hannibal & St. Jo R. Co. v. Rozzelle, 79 Mo. 349; s. c., *infra*; Louisville, N. A. & C. R. Co. v. Shanklin, 94 Ind. 297; s. c., *infra*.

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GREELY

v.

ST. PAUL, M. AND M. RY. CO.

(*Advance Case, Minnesota. January 21, 1885.*)

Gen. St. of Minnesota, 1878, c. 34, § 54, requiring railroad companies to fence their roads and to build cattle-guards at wagon crossings, applies as well to the limits of incorporated cities and villages as to the country.

This statute is to be construed as allowing an exception where the company has no legal right to do the act, as where it would obstruct public streets or other public grounds. There is also an implied exception as to places required to be left open by public necessity or convenience, such as station or depot grounds used for the exit or entrance of passengers, or the receipt and delivery of freight. But this public convenience is the limit of the exception.

Mere difficulty or inconvenience to the company creates no exception, and will not relieve it from complying with the law.

APPEAL from an order of the district court, Ramsey County.

Wm. Louis Kelly for respondent Thomas Greely.

R. B. Galusha and J. Kling for appellant St. Paul, M. & M. Ry. Co.

MITCHELL, J.—The statute reads: "All railroad companies in this State shall build, or cause to be built, good and sufficient cattle-guards at all wagon crossings, and good and substantial fences on each side of such road. All railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies, and a failure to build and maintain cattle-guards and fences as above provided shall be deemed an act of negligence on the part of such companies." Gen. St. 1878, c. 34, §§ 54, 55.

The first contention of defendant is that this statute has no application within the limits of an incorporated city or village. There is certainly no such exception to be found in the statute, and, if we consider the evil and danger against which the legisla



ture intended to provide, there is no reason why the requirements of the act should not apply within cities and villages as well as in the country. It is not for the court to nullify by construction the plain and explicit requirements of the statute. *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57; *Brace v. New York Cent. R. Co.*, 27 N. Y. 269; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427; *Tracy v. Troy & B. R. Co.*, 38 N. Y. 437; *Flint, etc., Ry. Co. v. Lull*, 28 Mich. 510. We find no authority to the contrary, except in those States where incorporated towns and villages are, in terms, excepted by the statute. These, of course, are not in point.

The second assignment of error is the refusal of the court, on the trial, to allow defendant to prove by its road-master "that there would have been difficulty in fencing and putting in cattle-guards there," and "that the point at which the horse wandered upon the track was within the yard limits of the defendant's road, and at that point it would have been impracticable to erect cattle-guards." This offer, as we construe it, does not contemplate any attempt to prove that the defendant had not the legal right to fence this part of its road, or to put in cattle-guards at this street crossing, or that this "yard" was a public place used, or required to be used, by the public in transacting business with the company, or that any public convenience or necessity required that it should be left open. With the offer in this form, it is to be assumed that the difficulty and impracticability proposed to be proved have reference solely to the convenience of the company. But inconvenience to the company will not relieve it from obeying the law. *Bradley v. Buffalo, N. Y. & E. R. Co.*, *supra*. Of course, this statute must be construed in the light of other provisions of law against obstructing streets, highways, and public grounds. Hence a statute like this, which, in general terms, imposes this duty on a railroad company, is always construed as allowing an exception where the company has no legal right to do the act. It does not require them, for example, to build a fence in a public street or other public grounds.

There is another exception implied as to places required to be left open by the public necessity or convenience, such as grounds about stations which are used for entrance or exit of passengers, or the receipt and delivery of freight; but this public convenience is the limit of the exception. This is as far as even the cases from Iowa and Indiana relied on by defendant go, when carefully examined. In *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549, in which the court held that the company was not bound to fence its "depot grounds," they place their decision upon the ground that these were required and used for loading and unloading freight, and all the purposes incident to a station, and hence that public convenience required that they be left open. They expressly say that mere inconvenience to the company has little if any weight; that they look rather to the public convenience and public interest.

That they did not intend to extend the exception beyond this is evident from a subsequent decision, in which they held that the space used for switches or side tracks adjacent to the station was not necessarily within the exception. *Comstock v. Des Moines V. R. Co.*, 32 Iowa, 376. See, also, *Latty v. Burlington, C. R. & M. Ry. Co.*, 38 Iowa, 250. It may also be suggested that the court laid special emphasis on the peculiar phraseology of the Iowa statute.

In Indiana, the court seems to have viewed some provisions of their statute as penal, and hence was inclined to construe it somewhat strictly. Yet in *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471, the court say "that while the statute has no application to points where it would be illegal or improper that roads should be fenced, such as the crossings of streets or alleys in a city or town, or at mills, etc., where public convenience requires the way to be left open, yet that this is the limit of the exception."

This was followed in *Jeffersonville, etc., R. Co. v. Parkhurst*, 84 Ind. 501, and is approved in *Flint, etc., R. Co. v. Lull*, *supra*. See, also, *Wabash Ry. Co. v. Forshee*, 77 Ind. 158, and *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412.

In *Pierce on Railroads*, 420, 421, the rule is stated thus: "A statute which, in general terms, imposes the duty on a railroad company to fence its road, is construed as allowing exceptions required by public necessity or convenience, and hence that it is not required its road across a highway, or to inclose grounds about its stations to fence for freight and passengers, which are required to be kept open for public convenience."

Thompson, in his work on *Negligence*, vol. 1, p. 521, concludes that the proper test, as deduced from the American cases, of whether a place ought to be fenced, seems to be the fact of its being in law a public place, joined with the fact of its practical use by the public.

The evidence offered by defendant did not tend to bring the case within either of the implied exceptions to the statute. It neither tended to prove that it had no legal right to construct fences and cattle-guards at this place, nor that public necessity or convenience, in transacting business with the road, required that the place should be kept open and unobstructed. As already suggested, the fact that it would be inconvenient for the company to fence, of itself creates no exception, and will not relieve it from complying with the law. If the statute is too strict or onerous, the remedy is with the legislature. Our conclusion, therefore, is that there was no error in excluding the evidence offered. Order affirmed.

**Fences and Cattle-guards in Towns and Villages.**—In those cases where fences and cattle-guards can be constructed in the streets of a town or village without interfering with ordinary traffic, the company is bound to construct them. *Madison, etc., R. Co. v. Kane*, 11 Ind. 375; *Jeffersonville, etc.,*

R. Co. v. Parkhurst, 84 Ind. 501; Toledo, etc., R. Co. v. Howell, 38 Ind. 447; Toledo, etc., R. Co. v. Owen, 43 Ind. 405; Brace v. New York, etc., R. Co., 27 N. Y. 269; Bradley v. Buffalo, N. Y. & E. R. Co., 34 N. Y. 427; Tracy v. Troy & B. R. Co., 88 N. Y. 437; Flint & P. M. R. Co. v. Lull, 25 Mich. 510; Cleveland & P. R. Co. v. McConnell, 26 Ohio St. 57; Indianapolis, Peru & C. R. Co. v. Lindley, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495. And see Hays v. Michigan Central R. Co., 15 Am. & Eng. R. R. Cas. 394. But where the construction of fences and cattle-guards in a town or city will interfere with or impede the free use of the streets by the public, the railroad company is not bound to erect them. Halloran v. New York, etc., R. Co., 2 E. D. Smith, 257; Vanderker v. Rensselaer, etc., R. Co., 13 Barb. 390; Parker v. Rensselaer, etc., R. Co., 16 Barb. 315; Crawford v. New York Central R. Co., 18 Hun (N. Y.), 108; Peoria, P. & G. R. Co. v. Barton, 80 Ill. 72; Towns v. Cheshire R. Co., 21 N. H. 363.

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INDIANA, BLOOMINGTON AND WESTERN RY. Co.

v.

HALE.

(93 *Indiana Reports*, 79.)

Where it is in question whether a railroad could properly be fenced at a certain place, it is not competent to take the opinion of witnesses upon the question, but the jury must be left to decide that question upon the facts proved.

FROM the Marion Circuit Court.

C. W. Fairbanks for appellant.

T. S. Adams for appellee.

HAMMOND, J.—Complaint in two paragraphs by the appellee against the appellant to recover damages for killing appellee's horse. The first paragraph of the complaint charged that the railroad, at the place at which the horse entered, was not securely fenced in. The second paragraph was based upon the alleged negligence of the appellant's employees.

The venue was changed, on the appellant's application, from the Hendricks Circuit Court, where the action was commenced, to the court below. Upon issues joined, there was a trial by the court, resulting in a finding and judgment for the appellee, over the appellant's motion for a new trial and exceptions. The overruling of the appellant's motion for a new trial is the only error properly assigned in this court.

The evidence tended to show that the animal was killed by a freight train on the appellant's railroad, in Raintown. The principal contention was whether the railroad could properly have been fenced at the place at which the horse entered upon the track and was killed.

A witness for the appellee, testifying as to the place in question, was asked by the appellee's counsel this question:

"I will ask you if there was a fence on the north side of the railroad right of way, would it interfere with the rights of the company in any way?" The witness answered, "No, sir."

Another witness was asked by the appellee's counsel this question:

"If there had been a fence there, would it have interfered with the rights of the company in any way?"

The witness replied: "No, sir, it would not interfere with anything; for even if it was going to be used for anything, there is no time in the season a person could go over it."

The appellee's counsel asked another witness the following question:

"I will ask you, in your opinion, would a fence between this vacant lot and the railroad right of way, extending from the lot on the west to the lots on the east, interfere with the rights of the company?"

The question was answered: "It would be no disadvantage to the railroad company or to the public."

Another witness was asked by the appellee's attorney:

"Could it (the railroad) have been fenced there without any inconvenience to the railroad company?"

The answer was: "Yes, sir."

The contexts show that the foregoing questions and answers had reference to the place on the appellant's railroad where the injury complained of occurred. To each of the above questions, before it was answered, the appellant made proper objections, but these were overruled, exceptions to the rulings were taken, and each of the witnesses answered as stated.

The general rule is that a witness must not give his opinion, but must testify as to facts. To this rule there are some exceptions. The opinion of an expert in any art, science, trade, profession or mystery, may be given where it is proper for the decision of a question relating to the issues in a case. There are many cases in which opinions of witnesses, who are not experts, may be taken. It is difficult, if not impossible, to lay down a rule applicable to all cases, to say when and under what circumstances the opinion of a witness may or may not be competent. In *Concord Railroad v. Greely*, 23 N. H. 237, the court said: "Upon subjects of general knowledge, which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone and the jury must form their opinions. In such cases the testimony of witnesses, as experts merely, is not admissible."

In *Commonwealth v. Sturtivant*, 117 Mass. 122 (19 Am. Rep. 401), it was said: "The exception to the general rule that witnesses cannot give opinions, is not confined to the evidence of experts."

testifying on subjects requiring special knowledge, skill or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general." Again, in the same case, upon this subject it was also said: "The competency of this evidence rests upon two necessary conditions: First, that the subject-matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time; and second, that the facts upon which the witness is called to express his opinion, are such as men in general are capable of comprehending and understanding."

The opinions of experts may be taken in matters of art, science, etc., because, even though they be able to give the facts, special knowledge is required to draw correct conclusions therefrom. One skilled in medical science might, without the expression of an opinion, state facts that would enable others of like skill to understand the character of a particular malady. But as men in general could not from such facts form a correct judgment, the court would, in a proper case, take the opinion of the medical witness as to the nature of the disease. There are also cases where non-experts may give their opinion in evidence. But this is allowable only where it is impracticable for the witness to reproduce to the jury the facts upon which his opinion is based. Thus a witness may give his opinion as to the identity of property. Except in rare cases one cannot describe property with such particularity as will enable the jury to conclude that it was the property in controversy. The points of description would apply to so many other things like that in dispute that the mind would be left in uncertainty as to the identity, even if there was no conflict in the statement of witnesses.

We think it may be stated, generally, that the opinion of a witness is not admissible in evidence where the facts upon which it is founded can be stated to, and intelligently comprehended by the court or jury trying the case, and where, from such facts, men in general are capable of drawing reasonably correct conclusions.

The law requiring railroad companies to fence their roads securely and making them liable, without reference to negligence, for animals killed by their locomotives and cars at places where

such fences have not been made, does not apply to points on their road where the fencing of the same would materially interfere with the rights of the public or of the railroad companies. For obvious reasons, a railroad company may not fence across a public highway, nor is it required to do so at places where it would interfere with receiving and discharging passengers or freight. It may be said in general that it requires no special knowledge to know whether a given point on a railroad should or should not be fenced. Men usually, from a knowledge of the facts upon this point, can draw correct conclusions, and witnesses acquainted with the facts pertaining to the location, can present the same in evidence to the court and jury. The opinion of a witness in such a case is not necessary, and should not, therefore, be given. *Toledo, etc., Ry. Co. v. Smith*, 25 Ind. 288; *Mitchell v. Allison*, 29 Ind. 43; *Jones v. State*, 71 Ind. 66; *City of Logansport v. McMillen*, 49 Ind. 493; *Baltimore, etc., Ry. Co. v. Johnson*, 59 Ind. 247; *Noah v. Angle*, 63 Ind. 425; *Bennett v. Meehan*, 83 Ind. 566; *Walton v. State*, 88 Ind. 9. We do not say that there may not be cases in which expert evidence upon the question of fencing may not be admissible, but the present is not such a case.

We think that there was error in permitting witnesses to give their opinion as to whether the place in controversy on the appellant's railroad could properly have been fenced. It is true the witnesses testified as to the facts, but as their opinions were erroneously received, and may, to some extent, have influenced the finding of the court, we are unable to say that the error was harmless.

Judgment reversed at the appellee's costs, with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings.

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EVANSVILLE AND TERRE HAUTE R. R. Co.

v.

WILLIS et al.

(98 *Indiana Reports*, 507.)

A railroad company is not required by the statute, to fence its road at places where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company are interfered with, or where such fencing would imperil the lives of its employees, and no recovery can be had under the statute for stock killed by its locomotives or cars at such places on the line of its road.

FROM the Sullivan Circuit Court.

A. Iglehart, J. E. Iglehart and E. Taylor for appellant.



J. B. Patton, J. T. Hays, J. T. Beasley and H. J. Hays for appellees.

HAMMOND, J.—This was an action by the appellees against the appellant to recover damages for killing a mule by the appellant's locomotive and cars, between the switch at Carlisle station and a bridge in Sullivan County, where the railroad was not securely fenced.

The appellant answered by a general denial, and also by a special paragraph, alleging that the injury complained of occurred near the town of Carlisle, at or near a point on the railroad track where it connects with a switch, used by the appellant for switching cars and trains of cars from and to the main track of the railroad; that it would be inconvenient and impracticable to fence the railroad at said place, or to build cattle-guards there, for the reason that if such fence or cattle-guards were there, they would interfere with the free use and enjoyment of said railroad, and switching privileges therewith connected, by the appellant, its servants, employees and the public dealing with it, and that the same would greatly endanger the lives of said employees operating trains of cars on said road, and in switching the same from said main track to and from said switch.

The appellees replied in denial of the special paragraph of the answer. There was a trial by jury; verdict for appellees; motion for a new trial overruled, and exceptions; and judgment on the verdict.

The evidence in the case establishes the following facts: At and north of the town of Carlisle, the appellant's railroad runs north and south. There are at that station two side tracks, one on either side of the main track, each connecting with the main track at a switch target north of the depot. The depot is situated between the main track and the west side track. West of, and near the west side track, between the depot and the north switch target, 150 feet south of said target, there is a steam flouring-mill, which receives and ships grain and flour on the appellant's cars. There is a wagon road from the mill to the side track, which is used by teams in loading and unloading at the mill and on and off cars standing on the side track. Each of the side tracks is used by the appellant in transacting its regular business, and by the public in loading and unloading freight. Seven hundred and fifty feet north of the switch target referred to there is a public highway running nearly east and west, and passing under a bridge crossed by the railroad at that point. The railroad embankment next to and south of the bridge is from fifteen to eighteen feet high, and gradually lowers to eight feet in height at the switch. The sides of the embankment are steep, but for a short distance near the switch a man can walk along the side thereof. The company's

right of way is eighty feet wide, forty feet on either side of the centre of the railroad track. Approaching the switch from the north the road is on a steep up-grade, which continues south of the switch. An average freight train on the appellant's road extends from the switch across the bridge over the highway, and some distance north of it.

The appellees' mule escaped from their field east of the railroad and north of the highway, and from said highway entered the appellant's right of way and went south. It entered upon the railroad track about 150 feet north of the switch, and thence went north on the track to a point near the south end of the bridge, where it was killed by the locomotive of a freight train at 11 o'clock at night, when it was very dark.

The evidence shows beyond question that the railroad could not be fenced along the side tracks without materially interfering with the business of the company, and also with the convenience of the public in transacting business with the railroad. But the only question in the case is whether the road could properly have been fenced between the switch and the bridge. To have securely fenced it at that place, it would have required a cattle-guard near the south end of the bridge and another at or near the switch. The evidence, we think, shows without conflict that a cattle-guard near the switch would greatly have endangered the lives of the appellant's employees in operating its trains. The up-grade approaching the switch from the north made it necessary to keep the train in motion, so that the brakeman who threw the switch had to get off the train a considerable distance from the switch before reaching it. The danger to the person thus going in advance of the train arising from a cattle-pit and cattle-guard to be passed over in the night, or in ice and snow, can readily be seen.

The facts about which there was no dispute show, we think, that cattle-guards between the switch and the bridge would be hazardous to the safety of the railroad employees in switching cars and trains. Under the circumstances, the railroad was, in our opinion, excused from fencing at the place in question. It is well-settled law that a railroad company is not required to fence its road where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company are interfered with. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind. 15; *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143; *Ohio, etc., Ry. Co. v. Rowland*, 50 Ind. 349; *Indianapolis, etc., Ry. Co. v. Crandall*, 58 Ind. 365; *Cincinnati, etc., R. R. Co. v. Wood*, 82 Ind. 593; *Pittsburgh, etc., Ry. Co. v. Bowyer*, 45 Ind. 496; *Indianapolis, etc., R. R. Co. v. Kinney*, 8 Ind. 402.

If a railroad company is not required to fence its road where the

rights of the company in running its trains or transacting its business are thereby infringed, there is greater reason for holding that it should not be required to fence its road where the lives and limbs of its employees would be thereby endangered.

It is suggested by the learned counsel for the appellees that the grade of the appellant's road at the place in question could be reduced so as to allow trains to stop as they approach the side tracks from the north, thereby giving the employees ample time, without danger, to go forward and do the switching. There is no proof that the reduction of such grade is practicable, and we must presume that, as established, it is as light as the topography of the country through which the railroad passes will admit of its being made. We express no opinion whether, for the sake of fencing, a railroad should in any case be held responsible for not changing the grade of its road.

The appellant's motion for a new trial should have been sustained.

Judgment reversed, at appellees' costs, with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings.

**Analogous Case.**—See *Lake Erie & Western R. Co. v. Kneadle*, *infra*.

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## LAKE ERIE AND WESTERN RY. CO.

v.

KNEADLE.

(94 *Indiana Reports*, 454.)

The liability of railroad companies for cattle killed, created by statute for failure to fence, depends upon whether they are bound to fence at the place where the cattle enter upon the track. The *onus* of proving that there was no sufficient fence at that place is on the plaintiff, and then the defendant must show a sufficient excuse therefor.

A railroad company is not bound to place fences or cattle-guards where they would interfere with the transaction of its business or endanger its servants.

FROM the Benton Circuit Court.

H. W. Chase, F. S. Chase, and F. W. Chase for appellant.

C. E. Lake and J. S. McMillin for appellee.

ELLIOTT, J.—The appellant prosecutes this appeal from a judgment rendered against it for the value of two cows killed by one of its locomotives.

Our decisions firmly settle the law that the liability of railroad companies for killing cattle depends upon whether they were

bound, under the statute, to fence at the place where the cattle entered upon the track. It is not material whether the place where the cattle were killed was or was not one which the company was required to fence, but the material inquiry always is whether the cattle entered at a place where it was the statutory duty of the company to securely fence. *Louisville, etc., Ry. Co. v. Overman*, 88 Ind. 115; *Wabash, etc., Ry. Co. v. Forshee*, 77 Ind. 158; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *Toledo, etc., Ry. Co. v. Howell*, 38 Ind. 447.

We are, therefore, to examine the evidence in this case, not with a view of ascertaining whether it was the duty of the appellant to fence at the place where the appellee's cows were killed, but whether it was the company's duty to fence at the place where the cattle entered upon the track.

The evidence shows that the animals were killed on the main track of the company, at a station called Talbot, and immediately opposite a large grain elevator. It also appears that at this point there was a spur, or side-track, used by the company for freight cars and for receiving and unloading grain, lumber, and other freight. The testimony does not directly show at what point the cows came upon the track, but it does clearly show that on the south side of the tracks there was a secure fence, and that on the north side there was a steep embankment down which cows would not go. The inference from the evidence is that appellee's cows entered upon the track at a place where it would have interfered with the business of the company in handling cars or in receiving and discharging freight, or else at a place where it would have endangered the lives of persons in the employment of the company, to have placed cattle-guards.

The plaintiff in such an action as this has the burden of showing that the animals entered at a place where the railroad was not fenced, and it is doubtful whether it can be said that there is any evidence showing where the cows did enter; but yielding the appellee the benefit of the doubt, and inferring in his favor that they did enter at a place where the track was not fenced, we are bound to also infer that the place where they entered was a place where the company was under no legal obligation to fence.

It is true that when the plaintiff proves that the place was not fenced, the burden is devolved upon the defendant of showing an excuse for not fencing. In this case we think the evidence does show that the side of the spur track could not have been fenced without injury to the business of the company, and it is established by many cases that railroad companies are not bound to fence at such places. The evidence brings the case fully within the decision in *Cincinnati, etc., R. R. Co. v. Wood*, 82 Ind. 593, and cases there cited.

A cattle-guard could not have been placed at the crossing of the

street called West Street without endangering the lives of persons engaged in managing the freight trains of the company. The adjudged cases declare that a railroad company is liable to its servants if it negligently or wrongfully makes unsafe and dangerous places in its tracks. Its duty with respect to its track is much the same as that to which it is held respecting its machinery. *Allen v. Burlington, etc., R. R. Co.*, 5 Am. & Eng. R. R. Cas. 620; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Lewis v. St Louis, etc., R. R. Co.*, 59 Mo. 495 (21 Am. R. 385); *Plank v. N. Y., etc., R. R. Co.*, 60 N. Y. 607. In the recent case of *Evansville, etc., R. R. Co. v. Willis*, 93 Ind. 507, s. c., *supra*, we held that a railroad company was not bound to place cattle-guards where they would endanger the lives of their servants. It seems to us that any other conclusion would be radically wrong, for it would place the company in the dilemma of becoming liable to its servants if it constructed cattle-pits at places where they would be dangerous, and liable to cattle-owners if it neglected to provide such guards.

The jury found, in the answers to interrogatories, against the appellee on the question of the duty of the appellant to fence, and took, substantially, the same view of the evidence that we have done, so that the case really turns upon the question whether a cattle-pit at the intersection of West Street would have been dangerous. The answer of the jury to the question as to whether the pit would have made the track dangerous is in these words, "Not naturally dangerous," and this, it is manifest, is an equivocal answer, for the question, in form, properly admitted of a simple affirmative or negative answer. We, therefore, feel less delicacy in setting aside the verdict than we should have done had there been a direct finding upon this point. It is clear to us from the evidence that a new trial should be awarded.

Judgment reversed.

HAMMOND, J., did not take any part in the decision of this case.

**Analogous Case.**—See *Evansville & Terre Haute R. R. Co. v. Willis et al.*, *supra*,

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BANISTER

v.

PENNSYLVANIA Co.

(98 *Indiana Reports*, 220.)

A complaint alleging that the defendant's servants, wrongfully "acting in the line of their duty and within the scope of their employment, and under the directions and instructions of the defendant," killed a mule of the plain-

tiff which had been injured by the defendant's train of cars, etc., shows the defendant's liability, and is good on demurrer.

A railroad company is not excused from liability for failure to fence in its tracks, because a way alongside of its track at the place in question was in use, and necessary to reach stock-lots and chutes where cattle could be loaded on its cars.

FROM the Bartholomew Circuit Court.

N. R. Keyes for appellant.

S. Stansifer for appellee.

COLERICK, C.—This action was instituted by the appellant against the appellee, to recover the value of a mule, which, it was alleged, had been killed by the appellee. The complaint was in four paragraphs. A demurrer was sustained to the fourth paragraph, and an answer was filed to the others, in two paragraphs, the first of which was afterwards withdrawn. A demurrer was overruled to the second paragraph of the answer, and, thereupon, a reply thereto was filed in two paragraphs, to each of which a demurrer was sustained, and, the appellant refusing to plead over, final judgment, on demurrer, was rendered against him, from which he appeals, and assigns as errors the rulings of the court upon said demurrers, which rulings we will consider in the order in which they were made:

1st. Did the court err in sustaining the demurrer to the fourth paragraph of the complaint? It averred "that on the 19th day of June, 1881, defendant was owning and operating a railroad in said county, and at said time was running a locomotive and train of cars thereon in Bartholomew County, Indiana, and while being run as aforesaid said locomotive and train of cars struck, passed over, and wounded and broke the leg of a certain mule, the property of the plaintiff, of the value of \$200; that the servants, agents and employees of said defendant afterwards, while the said mule was so wounded, wrongfully and unlawfully and purposely did kill said mule, when it was wholly unnecessary to kill said mule, as by proper care and attention he would have been saved; that said servants and employees, in killing said wounded mule, acted in the line of their duty and within the scope of their employment, and under the directions and instructions of defendant. Wherefore he prays judgment for \$200 and other proper relief."

It is well settled in this State by the decisions of this court that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as for their acts of negligence, though such particular acts are not authorized or ratified. *Jeffersonville, etc., R. R. Co. v. Rogers*, 38 Ind. 116; *Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239; *Terre Haute, etc., R. R. Co. v. Fitzgerald*, 47, Ind. 79; *Indianapolis, etc., R. R. Co. v. McClaren*, 62 Ind. 566; *American Ex.*



Co. v. Patterson, 73 Ind. 430 ; Louisville, etc., R. R. Co. v. Kelly, 92 Ind. 371 ; Indianapolis, etc., Ry. Co. v. Anthony, 43 Ind. 183. In the case last cited it was said : " The act of the agent within the general scope of his employment is the act of the master, and whether the act was necessary to be done, will depend upon the facts surrounding it. If the act done is within the general scope of employment, and is wrongful, the master is liable, although the act was unnecessary to the performance of the master's service, and was not intended for that purpose. We therefore think that the liability of the master does not depend upon the necessity for the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent." In the paragraph of the complaint under consideration, it was not only averred that the act complained of was wrongful, but it was expressly alleged that the act was performed by the servants and employees of the appellee " in the line of their duty, and within the scope of their employment, and under the directions and instructions " of the appellee. Under the decisions cited, which correctly assert the law, it is quite clear that the pleading was sufficient, and that the court erred in sustaining the demurrer thereto.

2d. Did the court err in overruling the demurrer to the second paragraph of the answer ? It was as follows :

" For a second paragraph of answer to the first and second paragraphs of plaintiff's complaint, defendant says that the place where said mule got upon the track of defendant's railroad, and was killed, was at the town of Elizabethtown, where for the use of the railroad and the shipping public of live-stock there has been continuously for the last twenty years stock-lots and a chute therefrom to the track of the railroad, through and over which live-stock have been loaded from said lots on the cars of defendant's railroad, which was and is the only convenience for that purpose within seven miles from said town. Said railroad along said stock-lots runs in a northwest, and southeast direction. Along the north side of said railroad at said stock-lots there is an inclosed field, the property of one Edward Springer, the northwest and southeast boundary fence thereof being along the line of the right of way of defendant's railroad. Within said field are said stock-lots, the northwest and southeast fence thereof being so much of said boundary fence of said field, and the other fences of the stock-lots being inner fences within said field. Aside from said chute there is and has been all the time but one way through which stock can and could be turned or put into or out of said stock-lots, which is a gateway in said northwest and southeast line of the fence of said lots and close, to wit, ten feet from said chute. A way, and the only way, to said stock-lots over which live-stock can or could be driven to or from the lots, has all the time run along the south side

of said railroad, entering the corporate limits of said town from the northwest, and running thence along said south line of the railroad until it intersects and connects with the public streets of said town, and entering on said way from the northwest it is open and connects with public highways, so that in turning stock into said lots they must, for there is no other way, pass over said way along the south side of said railroad and be driven across the railroad through said gate. Said mule was one of a team of two hitched to a wagon, and they strayed upon said way from the streets of said town to a point opposite said stock-lots, where they turned and went upon the track of said railroad, the tongue of the wagon fastening itself into said stock-chute, and said mule was then and there killed by defendant's locomotive, and in no other or different place or manner. Wherefore defendant says, because of the facts hereinbefore alleged, and not other or different, that defendant was not required to fence its road at the place where said mule got upon the track and was killed."

It was averred in the first paragraph of the complaint, "that the said railroad was not then and there fenced at the point where said mule got upon said road;" and it was alleged in the second paragraph, "that said road was not then and there fenced as required by law, either at the point where the mule was killed or where he got on the road."

"A railroad company is not required to fence its road where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company are interfered with." See *Evansville, etc., R. R. Co. v. Willis*, 98 Ind. 507, and the cases there cited. But "Whenever and wherever a railroad company can fence in its road without injury or obstruction to its own business and to public rights or easements, it must securely fence in its road, or it must be held liable in damages for any and all animals killed or injured, for the want of such fence, by its locomotive or cars upon the line of its railroad." *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380. To relieve a railroad company from liability for killing or injuring an animal by its locomotive or cars upon the line of its road at a place not securely fenced, it is necessary for the company to show that it was not legally bound to fence its road at that place. *Indianapolis, etc., Ry. Co. v. Penry*, 48 Ind. 128; *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426; *Terre Haute, etc., R. R. Co. v. Penn.*, 90 Ind. 284; s. c., *supra*; *Louisville, etc., Ry. Co. v. Clark*, 94 Ind. 111; s. c., *supra*. The company may prove under the general denial, without special plea, that the place where the animal was killed or injured was not a proper place to be fenced. *Jeffersonville, etc., R. R. Co. v. Lyon*, 55 Ind. 477; *Toledo, etc., Ry. Co. v. Owen*, 43 Ind. 405. But where, as in this case, it specially pleads, by way of answer in bar

of the action, the facts upon which it relies to escape liability for its failure to fence its road at the place where the animal was killed or injured, it must clearly appear by the facts averred that the company could not have fenced in its road at that place without injury or obstruction to its own business or to public rights or easements. It does not appear, with sufficient certainty, by the facts alleged in the answer in this case, that any such injury or obstruction would have occurred by the erection of a fence between the railroad of the appellee and the way, referred to in the answer, which runs parallel with the railroad, and by the construction of suitable cattle-guards at the place on said railroad where said way leading into the cattle-yards crosses the same; nor is it expressly averred in the answer that any such injury or obstruction would have resulted by the construction of such fence and cattle-guards. For aught that appears the same might have been erected without interfering with the rights of the company or the public, and thereby the injury complained of would have been averted. If so it was the duty of the appellee to have constructed the same, and by reason of its neglect to do so it rendered itself liable to the appellant for the damages which he sustained by the killing of his animal. If there is sufficient space between a railroad and an adjoining highway for the construction of a fence to prevent the ingress of animals from the highway to the railroad track, it is the duty of the railroad company to erect the same. *Louisville, etc., Ry. Co. v. Shanklin*, 94 Ind. 297; s. c., *supra*. And the fact that the company in constructing the fence would be compelled to locate the same on part of its reservation for a right of way would furnish no excuse for not building it. *Wabash Ry. Co. v. Forshee*, 77 Ind. 158.

It is as much the duty of a railroad company to fence against animals on highways as against those in adjoining fields and woods, and it is bound, under the statute, to erect and maintain cattle-guards to preclude the ingress of animals from highways to the track of the railroad. *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169; *Pittsburgh, etc., R. R. Co. v. Ehrhart*, 36 Ind. 118; *Indianapolis, etc., R. R. Co. v. Bonnell*, 42 Ind. 539; *Louisville, etc., Ry. Co. v. Clark*, *supra*; *Louisville, etc., Ry. Co. v. Porter*, 97 Ind. 268; s. c., *supra*.

For the reasons stated, we think that the answer was insufficient, and that the court erred in overruling the demurrer thereto.

In view of the conclusion which we have reached and expressed as to the insufficiency of the answer, it is unnecessary to consider the questions presented as to the sufficiency of the first and second paragraphs of the reply; they were certainly sufficient for a bad answer, and for that reason alone, if no other, the demurrers should have been overruled.

**PER CURIAM.**—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded, with instructions to the court to overrule the demurrers to the fourth paragraph of the complaint, and to the first and second paragraphs of the reply, and sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

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**BREMER**

v.

**GREEN BAY, STEVENS POINT AND NORTHERN R. R. Co.**

(61 *Wisconsin Reports*, 114.)

Plaintiff's cow strayed upon the defendant company's track and was killed by a passing train. She might have stayed on the track either at the company's station grounds where they were not bound to erect a fence or at other points where a fence should have been constructed, though the company had failed to do so. In an action to recover for the loss of the cow, *held*, that the plaintiff's case was fatally defective in that it failed to show that the cow had strayed on the track at a point where the company was bound by statute to construct a fence.

THIS action is for the value of a cow killed June 14, 1882, by a passing locomotive of the defendant on its railroad at a point about 2300 feet northwest of the defendant's depot in the village of Plover. It was originally brought in justice court and taken to the circuit court on appeal. The railroad had been in operation for more than three months, but had not been fenced at the point where the cow was killed. The evidence on the part of the plaintiff tends to show that he had been in the habit of keeping his cow nights at his barn, situated on the west side of his block and fronting to the west, and which barn was a few rods north of defendant's railroad track running east from its depot, and about 700 feet east or a very little north of east from its depot; that the lands between the front of the plaintiff's barn and the railroad track on the south, and the depot on the west or a little south of west, were unfenced and open to the common; that the tracks of the defendant's railroad immediately west and northwest of its depot formed a Y and that in and about the Y and for a long distance west and northwest of the depot, and for a long distance north and west of all the tracks of the defendant's railroad, there were no fences, but the lands were wholly open to the common; that the place where the cow was killed was about 1800 feet northwest from the depot grounds; that west and northwest of where the cow was killed was unfenced and open to the common; that east of the track

where the cow was killed was unfenced and open to the common as far as the main street in Plover, running north and south, and which passed on the easterly side of the plaintiff's block, on the west side of which the barn was situated. The plaintiff turned his cow out into the street on the west side towards the depot, about 6 o'clock A.M., June 14, 1882, but did not notice in what direction she went. She was killed the same day about 11 o'clock A.M. At the close of the plaintiff's testimony, the defendant moved for a nonsuit which was overruled, and the defendant excepted. Under all the testimony and the charge of the court the jury returned a verdict for the plaintiff, and judgment thereon, from which this appeal is brought.

Theo. G. Case for appellant. .

A. H. Sanborn and O. H. Lamoreux for respondent.

CASSODAY, J.—We are precluded from considering the only objectionable portion of the charge by the failure to file exceptions or move for a new trial. After a careful examination of the evidence, however, we are inclined to hold that the plaintiff failed in one particular to establish his case, and hence that the nonsuit should have been granted. There was nothing to prevent the cow going from the plaintiff's barn on to the depot grounds, and from thence along the defendant's railroad track to the place on the defendant's right of way where she was seen just before she was killed. She seems to have been lying down at the time with a number of other cattle. As the train approached from the north she was seen to jump up from behind a brush-heap and run on to the track a few feet ahead of the engine. How she came to be on the right of way at that place does not appear. Whether she came from the open common on either side of the track, or came along up the defendant's right of way from the depot grounds, is left by the evidence to mere conjecture. Of course the defendant was under obligation to build any necessary cattle-guards, and to fence its right of way at the point where the cow was killed, within three months from the time it commenced to operate its road at that point, and was liable in a proper case for all damages due to cattle occasioned in whole or in part by the want of such fences or cattle-guards. § 1810 R. I. ch. 107 L. 1880, 193 L. 1881. *Curry v. the C. & N. W. Ry.*, 43 Wis. 665. But the damage must be occasioned in whole or in part by the want of such fences or cattle-guards. If the cow came from the depot grounds, which the defendant was not obliged to fence, along the defendant's right of way to the place where she was killed, then it would not necessarily be occasioned in whole or in part by the want of such fences or cattle-guards. The burden was on the plaintiff to prove that she did not get on to the track at the point of the killing in that way. This was held by the court in *Bennett v. The Chicago &*

Northwestern Ry. Co., 19 Wis. 145. To recover it was incumbent upon the plaintiff to "show that the animal got upon the track at a point where the company was bound to maintain a fence, but had neglected to do so." *Id.* There seems to be no evidence in the case sufficient to have warranted the jury in finding that the cow was intentionally or wantonly killed. The undisputed evidence clearly shows that the speed of the train was very much slackened as it approached the cattle, and that the engine was reversed when the cow started to cross the track. These things show some degree of care and the absence of any recklessness or purpose to kill. The remarks of the plaintiff's counsel to which exceptions have been taken were very objectionable as well after he had been reprimanded by the court as before, and we are inclined to think we should reverse the cause on that ground if there was no other error. As it is, it becomes unnecessary to consider that question, except to suggest the impropriety of its repetition. *Elliott v. Espenhain*, 59 Wis. 277. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

**Complaint must Aver Failure to Fence.**—In an action under the statute to recover damages for the killing of an animal, it must be distinctly alleged in the plaintiff's complaint that the cause of the accident was defendant's failure to fence as required by law. *Baltimore, etc., R. Co. v. Wilson*, 81 Ohio St. 55.

**When Cattle Stray on Track at Point where Company is not Bound to Fence and Stray to where it is, Company is not Liable.**—When the animal got upon the track at a point where the company was not bound to fence, and strayed on the track to an unfenced point where there should have been a fence, and was there killed, the company was not held liable. *Great Western R. Co. v. Northland*, 80 Ill. 451; *Snider v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 558.

**Evidence as to where Animal came on Track.**—The evidence must distinctly show that the animal got upon the track at a point where there should have been a perfect fence, through a failure to provide the same. If the evidence shows that the animal might have got on at some other point where the company was not bound to fence, or at some point where there was a perfect fence, there can be no recovery. *Bennett v. Chicago, etc., R. Co.*, 19 Wisc. 145; *Morrison v. New York, etc., R. Co.*, 82 Barb. (N. Y.) 568; *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Jeffersonville, etc., R. R. Co. v. Brevoort*, 80 Ind. 324; *Toledo, etc., R. Co. v. Howell*, 88 Ind. 447; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648. But see, *contra*, *Fickle v. St. Louis, etc., R. Co.*, 54 Mo. 219; *Walther v. Pacific R. R. Co.*, 55 Mo. 276.

**General Reference.**—See for a full list of the authorities upon the subject touched on in the principal case, *Missouri Pacific R. Co. v. Perriquer*, and note, *infra*.

19 A. & E. R. Cas.—87



## MISSOURI PACIFIC RY. Co.

v.

## PERRIQUEZ.

(78 *Missouri Reports*, 91.)

In an action under the 48d section of the Railroad Law (R. S. of Missouri, 1879, § 809), the complaint should negative any reasonable inference that the injury complained of may have occurred at a point where the law does not impose any obligation on the company to fence; but it need go no further. Thus it need not be expressly averred that the place where the animal entered on the road was not within the limits of an incorporated town or city; an averment that it was at a point where the road runs along or adjoining uninclosed fields, will be sufficient.

The complaint in such an action alleged that plaintiff's cow "was crippled and got on the railroad at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway." *Held*, that this sufficiently showed that the injury resulted from the company's failure to build a fence.

APPEAL from Osage Circuit Court.

T. J. Portis and Smith & Krauthoff for appellant.

Belch & Silver for respondent.

PHILLIPS, C.—Action for double damages for killing cow named "Doodle," instituted before a justice of the peace in Osage County, upon the following statement:

"Plaintiff, for his cause of action against the defendant, alleges that the defendant is, and was at the time hereinafter referred to, a corporation duly organized under and by virtue of the laws of the State of Missouri under the corporate name of the Missouri Pacific Railway Company. Plaintiff further states that said defendant, by its agents, officers and servants, in conducting, managing, and running a locomotive engine and train of cars on its said road, did, on the 6th day of May, 1879, in Linn Township, Osage County, State of Missouri, run over and cripple a certain cow belonging to this plaintiff, thereby making said cow totally and entirely valueless to plaintiff, which said cow was about four or five years old, of a red and white color, and known by the name "Doodle," to the plaintiff's damage of the sum of \$20; that said cow was crippled and got on the railroad of said defendant at a point where the same runs along or adjoining uninclosed fields and lands, and where the same was not fenced with a good and lawful fence, and not at the crossing of any public highway. Wherefore plaintiff says an action has accrued to him and asks judgment in double damages so sustained, to wit, the sum of \$40, and costs."

A motion to dismiss upon the ground of the insufficiency of this

statement having been overruled, after appeal to the circuit court, the defendant excepted. Upon the trial in the circuit court there was a verdict for the plaintiff, the amount of which was on motion of plaintiff doubled, and judgment rendered accordingly, and the defendant's motions for a new trial and in arrest of judgment overruled, to all of which rulings the defendant excepted, and thereupon brings this case here by appeal.

The single question presented by this record is as to the sufficiency of the statement. It is objected that it does not allege that the point at which "Doodle" is averred to have entered upon the railroad, was not within the limits of an incorporated city or town, nor that the killing was in any wise the result of or occasioned by any failure on defendant's part to construct a fence.

It is not essential to the validity of a statement under the 43d section in question, that it should be affirmatively averred, that the point of entry on the road was not within the limits of an incorporated town or city. What this court has held touching this issue is, that there must so much appear to fix the liability as to negative a reasonable inference that the injury may have occurred at a point where the law does not impose any obligation on the defendant to fence. In other words, if from the statement it is as reasonably inferable that the point where the animal entered on the road may have been where the railroad was under no duty to fence, as where the law requires it to fence, the statement is bad. This is what was held in *Rowland v. Railroad Co.*, 73 Mo. 619; s. c., 7 Am. & Eng. R. R. Cas. 566; *Sloan v. Mo. Pac. Ry. Co.*, 74 Mo. 47, and *Bates v. St. Louis, I. M. & S. Ry. Co.*, 74 Mo. 60. But the statement under review here does negative the presumption that it might have occurred in an incorporated town or city; for it is distinctly averred "that said cow was crippled and got on the railroad of defendant at a point where the same runs along or adjoining uninclosed fields and lands."

Nor do we think the objection well taken that it does not sufficiently appear that the injury resulted from defendant's failure to construct a fence. It is in effect averred that the cow got on the railroad and was crippled at a point where defendant had neglected its duty to fence. This allegation is quite as full as that of *Edwards v. Kansas City, St. Jo. & C. B. R. R. Co.*, 74 Mo. 117, in which Hough, J., observes: "There is no express allegation that the cow got upon the track in consequence of the failure of the defendant to erect or maintain fences and cattle-guards as required by the statute; but we think the averment quoted, if not equivalent to such an allegation, will at least warrant an inference that the cow got upon the track by reason of the failure to fence. See also *Kronski v. Mo. Pac. Ry. Co.*, 77 Mo. 362; s. c., 13 Am. & Eng. R. R. Cas. 652; *Farrell v. Union Trust Co.*, 77 Mo. 475; s. c., 13 Am. & Eng. R. R. Cas. 552.

The judgment of the circuit court is, therefore, affirmed. All concur.

**Cattle coming on Track at Point where Company is not Bound to Fence.**—Where the cattle come upon the track at a point where the railroad company is not bound by statute to fence, it is not, in the absence of negligence on its part, liable for injuries to them. *Davis v. Burlington & M. R. Co.*, 26 Iowa, 549; *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515; *Jeffersonville, M. & I. R. Co. v. Huber*, 42 Ind. 173; *Great Western R. Co. v. Northland*, 30 Ill. 451; *Illinois Central R. Co. v. Bull*, 72 Ill. 537; *Smith v. Chicago, etc., R. Co.*, 34 Iowa, 506; *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72; *Schneir v. Chicago, etc., R. Co.*, 40 Iowa, 337; *Wier v. St. Louis, etc., R. Co.*, 48 Mo. 558; *Jeffersonville, etc., R. Co. v. Lyon*, 2 Am. & Eng. R. R. Cas. 648; *Snider v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 558; *St. Louis, Iron Mt. & S. R. Co. v. Nance*, 79 Mo. 196; s. c., *infra*; *St. Louis, Iron Mt. & S. R. Co. v. Asher*, 79 Mo. 432; s. c., *infra*; *Louisville, N. A. & C. R. Co. v. Quade*, 91 Ind. 295; s. c., *infra*; *Louisville, N. A. & C. R. Co. v. Hall*, 93 Ind. 254; s. c., *infra*; *Louisville, N. A. & C. R. Co. v. Harrigan*, 94 Ind. 245; s. c., *infra*; *Wabash, St. L. & P. R. Co. v. Tretts*, 96 Ind. 450; s. c., *infra*.

**Pleading in Illinois Statutory Exceptions to Duty of Fencing.**—In the State of Illinois, in an action to recover damages for an injury to cattle occasioned by a failure on the part of a railroad company to fence its road, the complaint must aver that the place of injury was a point where the company was bound to fence and not at a point where, by the express exceptions of the same clause of the statute, the company is not bound to fence. *Chicago, etc., R. Co. v. Carter*, 20 Ill. 390; *Ohio, etc., R. Co. v. Brown*, 23 Ill. 94; *Galena, etc., R. Co. v. Sumner*, 24 Ill. 681; *Illinois, etc., R. Co. v. Williams*, 27 Ill. 48; *Great Western R. Co. v. Bacon*, 30 Ill. 347; *Great Western R. Co. v. Hanks*, 36 Ill. 281; *Toledo, etc., R. Co. v. Lavery*, 71 Ill. 522.

**Pleading in Indiana Statutory Exceptions to Duty of Fencing.**—In Indiana it seems that the petition need not negative the exceptions. The fact that the case falls within any of them is matter of defence. *Jeffersonville, etc., R. Co. v. Brevoort*, 30 Ind. 325; *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Louisville, etc., R. Co. v. Klous*, 82 Ind. 357; *Terre Haute & Indianapolis R. Co. v. Penn*, 90 Ind. 284; s. c., 15 Am. & Eng. R. R. Cas. 561.

**Pleading Implied Exceptions and Exceptions in Separate Clause of Statute.**—According to the decisions in the State of Illinois, it appears that the complaint need not negative an exception contained in another clause of the statute or which is implied merely. *Chicago, etc., R. Co. v. Carter*, 20 Ill. 390; *Great Western R. Co. v. Helm*, 27 Ill. 98; *Toledo, etc., R. Co. v. Lavery*, 71 Ill. 522.

**Pleadings in Missouri as to Duty of Fencing.**—As to what is a sufficient complaint under the laws of Missouri to permit a recovery for a failure to erect and maintain a fence as required by statute, see the following authorities: *Rowland v. St. Louis, I. Mt. & S. R. Co.*, 73 Mo. 619; s. c., 7 Am. & Eng. R. R. Cas. 566; *Bates v. St. Louis, I. Mt. & S. R. Co.*, 74 Mo. 60; *Bowen v. Hannibal & St. Jo R. Co.*, 75 Mo. 426; *Sloan v. Missouri Pacific R. Co.*, 74 Mo. 47; *Morrow v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 82; *Luckie v. Chicago & Alton R. Co.*, 67 Mo. 245; *Cunningham v. Hannibal & St. Jo R. Co.*, 70 Mo. 202; *Johnson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 558; *Mumpower v. Hannibal & St. Jo R. Co.*, 59 Mo. 245; *Schulte v. St. Louis, I. Mt. & S. R. Co.*, 76 Mo. 324; *Edwards v. Railroad Co.*, 74 Mo. 117; *Williams v. Railroad Co.*, 74 Mo. 453; *Scott v. Railroad Co.*, 75 Mo. 136; *Belcher v. Railroad Co.*, 75 Mo. 515; *Terry v. Railroad Co.*, 77 Mo. 254; *Kronski v. Railroad Co.*, 77 Mo. 362; s. c., 13 Am. & Eng. R. R. Cas. 652; *Farrell v. Union Trust Co.*, 77 Mo. 475; s. c., 13 Am. & Eng. R. R. Cas. 552; *Turner v. Missouri*

Pacific R. Co., 77 Mo. 254; Missouri Pac. R. Co. v. Perriquet, 78 Mo. 91; s. c., *supra*; Missouri Pac. R. Co. v. Wade, 78 Mo. 362; s. c., *infra*; Missouri Pac. R. Co. v. Campbell, 78 Mo. 639; Hannibal & St. Jo R. Co. v. Rozzelle, 79 Mo. 349; s. c., *infra*; Dryden v. Smith, 79 Mo. 525; s. c., *infra*; Chicago, R. I. & P. R. Co. v. Clare, 79 Mo. 39; s. c., *infra*; St. Louis, Iron Mt. & S. R. Co. v. Nance, 79 Mo. 196; s. c., *infra*; St. Louis, Iron Mt. & S. R. Co. v. Asher; s. c., *infra*; Hannibal & St. Jo R. Co. v. Blakely, 79 Mo. 388; Hannibal & St. Jo R. Co. v. Hudgens, 79 Mo. 418.

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TERRE HAUTE AND INDIANAPOLIS R. R. Co.

v.

PIERCE.

(95 *Indiana Reports*, 496.)

In an action against a railroad company, to recover for the value of a horse killed by the defendant's cars, wherein one paragraph of the complaint was based upon the defendant's failure to fence its track, and another alleged a negligent killing, the defendant could not set up, by way of counter-claim, that the plaintiff had negligently suffered his horse to stray upon the track, where the cars ran upon it, and were thrown from the track, causing the defendant great damage, for which judgment was demanded.

Where such action is based upon the failure of the company to fence, it must be brought in the county where the killing occurred; but when it is based upon alleged negligence, it may be brought in any county through which the railroad runs. If such action be based on both these grounds, the Supreme Court, in the absence of evidence of the venue, will presume that a general finding or verdict was based upon the paragraph alleging negligence.

The Supreme Court takes judicial cognizance of county boundaries, and that a certain distance from a place named in a county is within that county.

Where a material fact is established by competent and uncontradicted evidence, the Supreme Court will not reverse the judgment because some incompetent evidence was admitted on the same point.

FROM the Parke Circuit Court.

J. G. Williams, A. F. White, and E. Hunt for appellant.

V. Carter for appellee.

HAMMOND, J.—Complaint in three paragraphs by the appellee against the appellant and two other railroad companies, for the alleged killing of a horse by the appellant, as lessee of a railroad running from Terre Haute, Indiana, to Rockville, Indiana. The appellee's right to recover was based, in the first and third paragraphs of his complaint, upon the failure of the appellant to fence securely the railroad at the place where the animal entered upon the same and was killed. The second paragraph seeks to recover upon the ground of negligence.

The appellant's answer was in two paragraphs. The first was a general denial. The second was a counter-claim, stating, as we copy from the appellant's brief, the following facts:

"That Pierce was the owner of a horse well known to be breachy; that he carelessly and negligently permitted him to run at large, and carelessly failed to provide suitable inclosures to keep his stock upon his own premises; that this horse, being the same one for whose value the suit is brought, entered upon the track of appellant in the town of Rosedale and wandered along the track between the fences on either side until it came to a bridge, where it remained until one of the appellant's trains approached, and, thereupon the horse attempted to run through the bridge, and, falling between the ties, obstructed the track so that appellant's locomotive was thrown from the track through the bridge, down into the creek, together with several loaded freight cars, by reason of all of which appellant was damaged in the sum of \$5000.

"The counter-claim further alleges that there was no order of the board of commissioners of Parke County permitting horses or cattle to run at large, and that appellant was wholly without fault or negligence, and that Pierce, although often requested, fails and refuses to pay the damages."

The other defendants answered by the general denial. The finding and judgment being in their favor, they will not be further noticed.

The appellee demurred to the counter-claim as follows:

"Comes now the plaintiff, and for reply to the second paragraph of the answer of the defendant, the Terre Haute and Indianapolis Railroad Company, demurs to said answer for the reason that said paragraph does not state facts sufficient on answer herein."

Trial by the court; finding for the appellee as against the appellant, and judgment on the finding, over the appellant's motion for a new trial.

The appellant assigns as errors the sustaining of the demurrer to its counter-claim, and the overruling of its motion for a new trial.

It is objected to the demurrer that it was so defective in form as not to present any question as to the sufficiency of the counter-claim. The demurrer is quite informal, and had the court below overruled, or wholly disregarded it, it is probable that there would have been no error for which the appellee could complain. It appears, however, from the record, that the parties and the court below understood the demurrer as being addressed to the counter-claim. Thus addressed, we think it was sufficient, in substance, to call in question the sufficiency of the facts stated in the counter-claim to constitute a cross demand against the appellee. *Petty v. Board, etc.*, 70 Ind. 290; *Mark v. Murphy*, 76 Ind. 534.

Had the facts stated in the counter-claim been set up as an independent cause of action by the appellant as plaintiff, against the appellee as defendant, the complaint would no doubt have been good upon demurrer. *Sinram v. Pittsburgh, etc., Ry. Co.*, 28 Ind. 244.

The difficult question is whether, in an action like the present, for a trespass, another trespass, resulting in an injury to the defendant, can be pleaded by way of counter-claim. It is provided in the third clause of section 347, R. S. 1881, that "The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

Section 350, R. S. 1881, defining a counter-claim, is as follows: "A counter-claim is any matter arising out of, or connected with, the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

We do not think the cause of action set forth in the counter-claim was a matter arising out of, or connected with, the appellee's cause of action. The appellee's cause of action, as stated in two paragraphs of his complaint, grew out of the appellant's failure to fence its railroad where the animal entered and was killed. His cause of action, as stated in the other paragraph of his complaint, was based upon the appellant's negligence in killing the animal. The appellant's cause of action, or cross demand, set forth in its counter-claim, was based upon the appellee's negligence in suffering his horse to run at large, whereby said horse strayed upon the appellant's railroad, causing to the latter the injury for which compensation is claimed in the counter-claim. It is too apparent for controversy that the appellee's negligence in permitting his horse to run at large, did not grow out of, and had no connection with, the appellant's failure to fence its road, nor with its negligence in running its locomotive and cars over and killing the appellee's horse. The respective acts of negligence complained of had no connection with, or relation to, each other.

The decisions of this court have been uniformly adverse to permitting one trespass to be pleaded as a counter-claim or set-off to another. *Conner v. Winton*, 7 Ind. 523; *Lovejoy v. Robinson*, 8 Ind. 399; *Slayback v. Jones*, 9 Ind. 470; *Shelly v. Vanarsdoll*, 23 Ind. 543; *Roback v. Powell*, 36 Ind. 515; *Frout v. Hardin*, 56 Ind. 165 (26 Am. R. 18); *Hess v. Young*, 59 Ind. 379. These decisions are in harmony, generally, with those of other States having codes similar to ours; though there are a few decisions holding to the contrary. See *Pomeroy Rem.*, section 790, and authorities there cited. These exceptional decisions, holding that a coun-



ter-claim in a case like the present is allowable, are the ones principally relied upon by the appellant to support its counter-claim.

It is not quite true, as has been sometimes stated, that a counter-claim is only admissible in actions *ex contractu*. To the contrary, we think that the decisions of this court show that in some actions *ex delicto*, a counter-claim growing either out of contract or tort may be pleaded. But an examination of these cases will show that the matters stated in the complaint and the counter-claim arose out of the same transaction, and that such transaction related to a contract of some kind between the parties. A reference to some of these cases will now be made.

*Judah v. Trustees, etc.*, 16 Ind. 56, was an action against the defendant to recover the value of certain bonds and coupons received by him as attorney for the plaintiff, and converted to his own use. That was an action sounding in tort, known at law as an action of *trover*. 1 Chit. Pl. 146. The defendant answered by counter-claim that the bonds and coupons in controversy were retained under contract with the plaintiff for legal services rendered by the defendant. It was held that the case admitted of the counter-claim. It will be noticed that the cause of action stated in the complaint and the matter set up in the counter-claim both related to and grew out of the same transaction, or contract, namely, the employment of the defendant by the plaintiff as attorney, and the defendant's claim for compensation for services under such employment.

In *Grimes v. Duzan*, 32 Ind. 361, the plaintiff brought an action to set aside, for fraud, a conveyance made by him to the defendant. The defendant answered by counter-claim, setting up title under his deed from the plaintiff, charging the plaintiff with being in the unlawful possession of the land, and asking to have his title quieted, and for possession. The complaint and counter-claim were both founded in tort. The counter-claim was held good. Here, also, it will be observed that both causes of action grew out of the transaction of the plaintiff's conveyance to the defendant.

The cases are too numerous to mention, where it has been held in actions on promissory notes and other contracts, that a counter-claim was admissible, setting up a cross demand on account of the plaintiff's fraud with respect to the consideration of the note or contract sued upon. All these cases differ materially from those first above cited where, as in the present case, the tort set up by the way of set-off or counter-claim had no connection with the tort for which the suit was brought, and no relation to a prior contract. We think there was no error in sustaining the demurrer to the counter-claim.

The appellant's motion for a new trial stated as causes therefor, that the finding was not sustained by sufficient evidence, and was

contrary to law; also, that there was error in the admission of certain evidence.

The appellant claims that there was no evidence authorizing a finding that the appellee's horse was killed by actual collision with any train. The evidence shows that the horse, the day after he was missed by the appellee, was found dead under the railroad bridge, being cut in two, and that there was blood and hair on the ties of the bridge above the place where the horse was found. These circumstances, with others given in evidence, were sufficient to raise the presumption that the horse was killed by a railroad train.

It is also urged that the evidence does not show that the horse was killed in Parke County. An action against a railroad company for killing stock, on account of its road not being fenced, is local, and must be brought in the county where the injury occurred. Sections 4026 and 4029, R. S. 1881. But an action against a railroad company for killing stock through negligence is transitory, and may be brought in any county through or into which such railroad passes. Section 311, R. S. 1881; *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293. While two paragraphs of the appellee's complaint sought to recover on the ground of the appellant's road not being fenced, one paragraph was based upon the appellant's negligence. As the finding of the court does not show upon which paragraph of the complaint it was predicated, we would, perhaps, in the absence of proof as to the venue, have to presume that the finding was on the paragraph of the complaint alleging negligence. But, however this may be, we think that the record contains sufficient evidence to show that the injury happened in Parke County. The testimony establishes the fact that the injury occurred at a bridge on a railroad operated by the appellant one mile north of Rosedale. This court takes judicial notice of the geography of the country. 1 Works Pr., section 348. And we judicially know that a point on the railroad one mile north of Rosedale would be in Parke County. In *Indianapolis, etc., R. R. Co. v. Moore*, 16 Ind. 43, which was an action for killing stock at a place where the railroad was not fenced, the proof showed that the injury took place between Shelbyville and London, one and a quarter miles from London. It was held that the evidence sufficiently showed that it was Shelby County. *Louisville, etc., Ry. Co. v. Breckenridge*, 64 Ind. 113, cited by the appellant, is at variance with the weight of authority upon the question now under consideration, and as to this point said decision is hereby overruled.

The evidence admitted over the appellant's objection, and for which he urges a reversal of the judgment, related to the appellant operating the railroad at the time of the injury. Independent of the evidence which may have been improperly received, the proof was ample and uncontradicted that the appellant, as

lessee, was at the time named operating the railroad as alleged in the complaint. Had there been a conflict of evidence upon this point, the admission of some of the evidence complained of might have constituted an error that would require us to reverse the judgment. But where, as in this case, a fact is sufficiently proved by competent evidence, we must hold that, where there is no evidence to the contrary, the admission of additional, incompetent evidence in support of the same fact is, at most, a harmless error, which will not authorize a reversal. The motion for a new trial was properly overruled.

Judgment affirmed, at appellant's costs.

ZOLLARS, J., concurs in the conclusion, but doubts the correctness of what is said upon the question of counter-claim under our statute.

**Injuries to Trains from Trespassing Cattle.**—Railroad companies are ordinarily entitled to recover damages from the owners of cattle trespassing on the track when a collision occurs, in consequence injuring a railroad train. *Housatonic, etc., R. Co. v. Knowles*, 30 Conn. 331; *Hannibal, etc., R. Co. v. Kenny*, 41 Mo. 271; *Sinmam v. Pitts, Ft. W. & C. R. Co.* 28 Ind. 244; *Eames v. Salem, & L. R. Co.* 898 Mass. 560; *New York & Erie R. Co. v. Skinner*, 19 Pa. St. 298; *N. E. R. Co. v. Sinlath*, 3 Rich. L. (S. C.) 185; *Annapolis & E. R. R. Co. v. Baldwin*, 11 Am. & Eng. R. R. Cas. 486.

But in an action against the company for injuring cattle, the defendant cannot set up as a set-off an injury to the train. *Simkins v. Columbia, & Greenville R. Co.*, 20 S. C. 259: s. c., *supra*.

**Suit must be brought in Court having Jurisdiction over Place of Accident.**—Upon this point see *Wade v. Missouri Pacific R. Co.*, and note, *infra*.

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## MISSOURI PACIFIC RY. CO.

v.

WADE.

(78 Missouri Reports, 362.)

The complaint in this case does by implication, though not expressly, negative the possibility that the animal was killed at a public crossing or within the corporate limits of a town or city. The averment is, that it was killed at "a certain point of uninclosed timber land." The complaint also contained an averment that the animal came upon the track and was killed at a place which the law required the company to protect with a fence or cattle-guard. *Held*, that on this ground also it was sufficient.

The complaint alleged that the animal was killed in Jefferson Township. The case was first tried before a justice of that township. The instructions in the circuit court told the jury that they could not find for plaintiff if the animal was not killed in that township. There was no evidence in the record to show where the killing occurred; but it did not satisfactorily ap-

pear that all the evidence was preserved. *Held*, that this court would presume that the killing had been shown to have taken place in Jefferson Township.

In an action under the 43d section of the Missouri R. R. Law the court instructed the jury that they might, in addition to double damages, allow the plaintiff interest; but it sufficiently appeared that no interest had been allowed. *Held*, that the instruction was erroneous, but as the defendant had not been prejudiced the error was immaterial.

APPEAL from Cole Circuit Court.

T. J. Portis and Smith & Krauthoff for appellant.

G. T. White for respondent.

MARTIN, C.—This was an action against a railroad company for the killing of a bull. The action was commenced on the 2d day of March, 1878, before a justice of Jefferson Township in Cole County, and was brought under the 43d section of the 2d article of the Railroad Act as amended by the act of February 18, 1875. 1 Wag. Stat. 310, § 43; Sess. Acts 1875, p. 131. The action was commenced in the name of George E. Wade, the owner of the bull, and the present plaintiff, after his death, as sole devisee under his will, was substituted as his successor to the right of action. The complaint upon which the action was founded, reads as follows:

“Before H. W. Long, a justice of the peace within and for the State of Missouri, county of Cole, Jefferson Township.

George E. Wade, Plaintiff,

<sup>v.</sup>  
Missouri Pacific Ry. Co.,

Defendant.

} Complaint.

“Plaintiff states that defendant is a corporation duly incorporated under the laws of the United States and State of Missouri, and is acting as such; and that in the month of October, 1877, while running and operating its locomotives and cars on its railroad track in said township at a certain point of uninclosed timber land near Gray’s Creek, wrongfully and unlawfully neglected to erect and maintain a lawful fence on the sides of their said railroad where it passes through uninclosed lands, and unlawfully failed to construct cattle-guards where fences are required sufficient to prevent horses, cattle, mules, and other animals from getting on their said railroad at said points, as is required by the statutes in such cases, and that by reason and on account of such failure to erect said fences and construct said cattle-guards, a certain bull, the property of plaintiff, and of the value of \$100, went on to said railroad track at said point, and whilst said bull was on said track as aforesaid, he was run over and killed by said locomotives, cars and trains of defendant, then and there run and managed by its agents and servants. And said bull was wrongfully killed in the manner as herein stated in con-

sequence of his getting on to railroad track as aforesaid, and not having cattle-guards as aforesaid. Wherefore plaintiff asks judgment for \$200, double the damage sustained by him by reason of the matters and things herein stated, and under the statute concerning corporations, railroads and railroad companies.

"And for further cause of complaint, plaintiff says that whilst he was the owner of the bull aforesaid, of the value aforesaid, and defendant, whilst operating its locomotives and trains in the township aforesaid, and at the time aforesaid, by its agents and servants so negligently and carelessly ran the same at and near a public crossing, and among other acts of carelessness and negligence then and there failed to ring the bell or sound the whistle, and thereby carelessly and negligently ran over, on their railroad track, said bull of plaintiff and killed him, whereby plaintiff says he is damaged in the sum of \$100, and for which plaintiff asks judgment."

The trial before the justice was by default, and the value of the animal was assessed at \$100, and judgment rendered for \$200, being double damages under the statute. At the trial in the circuit court, which came off on the 28th day of May, 1880, the defendant appeared by attorney, and the plaintiff introduced witnesses, who knew the bull and who saw him shortly after he was killed. From their evidence, which is of a very circumstantial character, there seems to be no doubt about the facts surrounding the death of the bull. He was struck at a point on the railroad near Gray's Creek about fifteen feet west of a public crossing, and about forty-five feet east of the east abutment of a railroad bridge which spans the creek. There was no fence or inclosure of any kind to keep him off the track at that point. After he was struck he dragged himself down to the bed of the creek where he died. He weighed about 1300 pounds, and his heavy tracks on the grass indicated that prior to the accident he had been grazing near the bridge. His blood and hair left on the railroad track, and the car grease on his carcass, plainly pointed to the cause of his decease, and the exact point on the track where he met his fate. The evidence tended to show that he was four or five years old, of the Durham and Duchess breed, and that he was worth from \$50 to \$75. The defendant introduced no evidence, and the jury returned a verdict assessing the damages at \$100, from which the defendant has appealed. A good many instructions were asked and given and refused, but which need not be considered in detail in disposing of the case.

It is objected that the complaint does not expressly negative the possibility of the animal having been killed at a public crossing or in the corporate limits of a town or city.

This objection is not well taken. It is alleged in the complaint that the bull was killed on the railroad, at "a certain point of uninclosed timber land," where the defendant had neglected to main-

tain fences and cattle-guards, to prevent stock from getting on the track; that it was at a point where the law required the defendant to maintain fences, etc., and that the bull was injured by reason of that neglect. I think the language sufficiently negatives the possibility of the point being on a public crossing. It is equally strong against the possibility of its being inside the corporate limits of a city.

Indeed the sufficiency of the petition is clearly within the rule laid down in the cases cited by defendant; *Rowland v. Railroad Co.*, 73 Mo. 619; s. c., 7 Am. & Eng. R. R. Cas. 566; *Bates v. Railroad Co.*, 74 Mo. 60; s. c., 14 Am. & Eng. R. R. Cas. 700; because it is expressly and substantially averred that the bull was killed at a point which the law required the defendant to protect with a fence or cattle-guard, and that he entered upon the track at that point, and was killed by reason of the defendant's failure to maintain such fence and cattle-guard.

It is objected that the evidence in the record fails to show that the bull was killed in Jefferson Township. This point is not well taken. The defendant at the trial objected to the sufficiency of the complaint in this respect. But the complaint shows that the killing took place in Jefferson Township. The case was tried before a justice of that township, and after verdict it should be presumed that such a necessary fact was proved, otherwise the verdict could not have been rendered. The objection is not saved in the motion for a new trial, as it should have been to make it available here. Neither does it appear satisfactorily from the bill of exceptions that all the evidence was preserved. The jury was instructed that they could not find for the plaintiff, if the bull was not killed in Jefferson Township. They must have had the evidence before them to render their verdict, and the bill of exceptions does not indicate positively that there was no such evidence.

The most serious objection raised is the giving of the following instruction for plaintiff: "If the jury find for the plaintiff, they will find the value of the bull when killed, and may give damage in double the value so found, and if they see fit give interest over and above the value." This instruction might do in an action of trover for the conversion of personal property. I allude to that part of it relating to interest. But it has been held that it will not apply to actions for negligence. *Meyer v. Railroad Co.*, 64 Mo. 543; *DeSteiger v. Railroad Co.*, 73 Mo. 33; s. c., 7 Am. & Eng. R. R. Cas. 592. I do not think the defendant has been injured by it. It seems very clear from the evidence preserved and the verdict rendered that no interest was actually included in the finding of the jury. The highest estimate of the value of the bull given by the witnesses was \$75, and the lowest estimate \$50. The jury assessed the damages at \$100. Their verdict was as follows: "We, the jury, find for the plaintiff, and assess his damages at



\$100." Now under the instruction of the court which left to the jury the right to double the damages, this verdict must be taken as giving the full measure of double damages called for in the complaint. *Seaton v. Railroad Co.*, 55 Mo. 416. Judgment was entered upon it as such, without doubling the amount. As it stands, it is conclusive against the plaintiff, and he has not ventured to disturb it. Assuming that the jury followed the evidence before them, it is evident that their verdict for \$100 was just double the minimum price or value of the bull, sworn to by the witnesses, which was \$50, and did not include any interest. I do not think the defendant has sustained any prejudice by this instruction about interest; and I am satisfied that a reversal of the case on this ground would ignore the merits of the controversy, and result in no substantial advantage to the defendant in another trial. In the trial before the magistrate the judgment was for \$200, double damages.

For these reasons I think the judgment should be affirmed. PHILIPS, C., concurs.

WINSLOW, C., dissented, on the ground that the instruction permitting the jury to find interest as a part of the damages was a fatal error, and was not cured by any of the considerations presented in the majority report. As to the other points he concurred.

**Pleading in Missouri.**—As to what is a sufficient complaint under the laws of Missouri to permit a recovery for an injury to cattle caused by a failure to erect and maintain a fence as required by statute, see *Missouri Pacific R. Co. v. Perriuez*, and note, *supra*.

**Suit must be brought in Court having Jurisdiction over Place of Accident.**—A statutory action against a railroad company for an injury to cattle occasioned by its failure to fence must generally be brought in a court having jurisdiction over the place where the injury occurred. *Little Rock & Ft. S. R. Co. v. Clifton*, 38 Ark. 205; *Evansville & C. R. R. Co. v. Epperson*, 59 Ind. 438; *Louisville, N. A. & C. R. Co. v. Breckenridge*, 64 Ind. 113; *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293; *Louisville, N. A. & C. R. Co. v. Kieus*, 82 Ind. 357; *Louisville, N. A. & C. R. Co. v. Davis*, 83 Ind. 89; *Louisville, N. A. & C. R. Co. v. Wickerson*, 83 Ind. 153; *Grand Rapids & Indiana R. Co. v. Southwick*, 30 Mich. 444; *State ex rel. v. Judge of District Court*, 33 La. Ann. 954; *Davis v. Central, etc., R. Co.*, 17 Ga. 323; *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496; s. c., *supra*; *Louisville, N. A. & C. R. Co. v. Harrington*, 92 Ind. 457; s. c., *infra*.

## HANNIBAL AND ST. JOSEPH R. R. Co.

v.

ROZZELLE.

(79 *Missouri Reports*, 349.)

A complaint in an action under the 43d section of the Railroad Law for killing cattle, alleged that the cattle "came upon the track and were run over and killed at a point on the same where it passes through uninclosed lands and at a point on said road where there was no public or private crossing." *Held*, that these averments sufficiently negatived the possibility that the killing took place in a city, town, or village, or at a station.

The fact that a railroad track runs parallel with and adjoining a public highway or another railroad track, does not exempt the company from the duty of fencing when it passes through inclosed and cultivated fields or uninclosed lands.

APPEALED from Clay Circuit Court.

G. W. Easley for appellant.

Rozzelle & Spiker and Smirall & Sandusky for respondent.

HENRY, J.—This action was instituted in the circuit court of Clay County to recover double damages of defendant for killing four steers, the property of plaintiff. The petition alleges that the cattle "came upon the railroad track and were run over and killed at a point on the same where it passes through uninclosed lands, and at a point on said road where there was no public or private crossing," and where said road was not fenced. Plaintiff had judgment from which this appeal is prosecuted.

The first question relates to the sufficiency of the petition, and it is contended that "for aught that appears in the petition the animals may have been killed in a city, town, or village, or at a station." This question was recently passed upon by this court in *Rutledge v. Hann. & St. Jo. R. R. Co.*, 78 Mo. 286; s. c., *infra*, and decided adversely to defendant, and we might dispose of this by a simple reference to that case, and will only add that in speaking of the subdivisions of a tract or tracts of land embraced in town or city plats, they are almost invariably mentioned as blocks or lots, and when one speaks of a tract of land he is understood to refer to a tract not so subdivided. The petition might, and, as the suit was commenced in the circuit court, should have been more specific, but, after verdict, we must hold it sufficient.

Appellant's counsel also insists that at the point where the cattle were killed the defendant was under no obligation to fence. The plaintiff was driving a lot of cattle from Kansas City, north, and the four that were killed strayed from the public road and passing over the St. Louis, Kansas City & Northern Ry. got

upon defendant's track and were killed by a train of cars. "For some distance before you reach the crossing," said a witness, "the defendant's track, the track of the St. Louis, Kansas City & Northern Ry., and a public road, run alongside of and parallel with each other. The track of the St. Louis, Kansas City & Northern Ry. is south of and about ten feet distant from defendant's track, the public road is south of the track of the St. Louis, Kansas City & Northern Ry., and runs immediately along the edge of the embankment upon which it is built, and the Missouri River is south of and close to the public road. There is a strip of beach between the public road and the river." The two railroads and the public road run parallel with each other for about two hundred yards west of the crossing, and the cattle got on defendant's road about fifty yards above the crossing.

The case of *Rutledge v. Railroad Co.*, *supra*, decided this question also. The object of the statute is to afford protection to private property as well as to passengers on trains. The owner may lawfully permit his stock to run at large, and, if they stray upon the track of a railroad, it is no defence that the highway and the railroad run parallel, and that the right of way of the company adjoined the highway. A highway and a railroad track might so run for miles through uninclosed prairie land upon which thousands of cattle are grazing. Such was the case with several of the railroads in this State when the Double Damage Act was first enacted. It does not follow because a railroad right of way is parallel to and adjoining a public road that the railroad built upon that right of way does not run through the land upon which the highway is established and opened.

Nor does the fact that the track of the St. Louis, Kansas City & Northern Ry. Co. lay between the defendant's road and the highway, and that the two railroad tracks were but nine feet apart, excuse the defendant from erecting fences. The St. Louis, Kansas City & Northern Ry. is but an easement over the land it occupies. The duty of fencing is imposed on each road, and even if the other road had erected the required fence adjoining the highway, and the cattle had strayed from the highway on to that road through a defect in the fence, occasioned by an accident which would have exempted that company from liability had they been killed on that road, and from that had strayed upon defendant's road and been killed, the defendant would have been liable to the owner.

Judgment affirmed. All concur, HOUGH, C. J., in the result.

**Pleading in Missouri.**—As to what is a sufficient complaint under the laws of Missouri to permit a recovery for an injury to cattle occasioned by a failure on the part of a railroad company to construct a statutory fence, see *Missouri Pacific R. Co. v. Perriquer*, and note, *supra*.

**Fences along Highway Parallel with Track.**—A railroad company is ordi-

narily bound by statute to fence its road when it runs alongside of a highway. Indianapolis & C. R. Co. v. Guard, 24 Ind. 222; Indianapolis & C. R. Co. v. McKinney, 24 Ind. 288; Toledo, W. & W. R. Co. v. Cary, 87 Ind. 172; Jeffersonville, etc., R. Co. v. Sweeney, 82 Ind. 430; Hannibal & St. Jo. R. Co. v. Rutledge, 78 Mo. 286; s. c., *infra*; Louisville, N. A. & C. R. Co. v. Shanklin, 94 Ind. 297; s. c., *supra*.

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ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RY. CO.

v.

ASHER.

(79 Missouri Reports, 432.)

In an action against a railroad company for killing plaintiff's hogs, founded on the 43d section of the Railroad Law, the petition failed to state that the hogs came upon defendant's track at a point where defendant was required by law to fence. *Held*, that it was for this reason fatally defective.

APPEAL from Butler Circuit Court.

T. J. Portis and Smith & Kranthoff for appellant.

S. M. Chapman for respondent.

PER CURIAM.—This suit originated before a justice of the peace in Butler County, and was for the recovery of double damages for stock killed by the defendant's road in August, 1877, and the trial in the circuit court to which it was appealed, occurred before the Revised Statutes of 1879 took effect. The statement filed was as follows:

"Plaintiff states that the defendant is a corporation duly incorporated by the laws of the State; that it was the occupier of and managing a railway between the town of Poplar Bluff, Missouri, and the city of Cairo, Illinois, between the 12th day of August and the 12th day of September, 1877; that between said days defendant, by its engines and cars, on the line of its said road in the township of Poplar Bluff, Missouri, at a point on said road where it was not fenced and where there was no public crossing or cattle-guards, killed thirty hogs, the property of plaintiff, of the value of \$300. Plaintiff therefore prays judgment for \$600, double the value of said property, as provided by statute."

The petition fails to allege that the hogs got on the track at a point where the company was by law required to fence; and under all the decisions of this court on that question is fatally defective. Judgment reversed.

General Reference.—See Wabash, St. L. & P. R. Co. v. Tretta, and note, *infra*.

## ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RY. CO.

v.

NANCE.

(79 *Missouri Reports*, 196.)

Under the statute, a railroad company is not liable to the owner of stock killed or injured, unless it get upon the track at a place where the company is by law required to fence; and no statement of the cause of action is good which does not contain such an averment, expressly or impliedly.

Where the petition shows no cause of action, a judgment for the plaintiff will be reversed, although no exception was taken in the court below.

APPEAL from Jefferson Circuit Court.—Hon. L. F. Dinning, Judge.

Reversed.

George H. Benton and Thomas J. Portis for appellant.

Louis Wagner and B. Zwart for respondent.

HENRY, J.—This is a suit commenced in a justice's court in Iron County, to recover double damages for stock killed on defendant's road by a train of cars. Plaintiff had judgment successively in the justice's and in the circuit court, and defendant has appealed to this court, and the only ground upon which a reversal is urged is that the statement filed before the justice does not contain sufficient facts to constitute a cause of action. It alleges that "defendant by its agents, engines, and cars killed one white steer, the property of plaintiff, at a place on its road where the same passes through, along, or adjoining uninclosed lands, where defendant failed to construct lawful fences . . . and by reason of such failure, against the provisions of the statute made and provided, to plaintiff's damage in the sum of \$50."

In *Cecil v. Railroad Co.*, 47 Mo. 246, it was held that on a statement which failed to allege that the stock got on the road through a defect of cattle-guard, or in consequence of a failure to fence, plaintiff could not recover, and that decision has never been questioned by this court. The railroad company, under the section upon which this action is based, is not liable to the owner of stock killed or injured unless it got upon the track at a place where the company is by law required to fence, no matter at what place it may be killed or injured, and no decision of this court can be found in which a statement omitting that averment has been held good. In *Edwards v. Railroad Co.*, 74 Mo. 117, and *Bowen v. Railroad Co.*, 75 Mo. 426, the averments in the statement were held sufficient to warrant the inference that the stock got upon the track by reason of the failure to fence, but there is no allegation

in this statement from which such an inference can be drawn. We are not inclined to be technical in the construction of statements filed with justices in such cases, but they must contain, expressly or by reasonable implication, a statement of the facts which entitle plaintiff to recover.

Nor was the objection out of time. It was made in the circuit court, in a motion in arrest of judgment, and it has been repeatedly held by this court that where the petition shows no cause of action it will be considered here, although no exceptions were taken in the court below. *State ex rel. v. Griffith*, 63 Mo. 545; *Bateson v. Clark*, 37 Mo. 31.

The judgment is reversed, and the cause remanded. All concur.

**General Reference.**—See *Wabash, St. L. & P. R. Co. v. Tretta*, and note, *infra*.

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## LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

QUADE.

(91 *Indiana Reports*, 295.)

In an action against a railroad for killing stock, the complaint alleged that the defendant, while running its cars over the road, at a place where the road was not securely fenced, ran over and killed certain stock; that the place where such stock entered on the defendant's road was not at the crossing of any public highway or in the corporate limits of any city or town, but was a place where the company was required by law to fence and could have fenced. On demurrer, *held*, that the complaint did not aver that the road was not fenced securely at the place where the stock entered.

If the place at which the stock entered was one which the road was required to fence and was capable of being fenced, as alleged, the presumption is that the company had done its duty in regard to fencing it.

FROM the Jasper Circuit Court.

W. F. Stillwell for appellant.

J. N. Wallace for appellee.

**NIBLACK, C. J.**—Action by Julius Quade against the Louisville, New Albany & Chicago Ry. Co. for killing live-stock. The action was commenced in the White Circuit Court, and taken upon a change of venue to the Jasper Circuit Court. The complaint was in two paragraphs.

The first paragraph charged that on the 7th day of May, 1882, at the county of White, and State of Indiana, the defendants, while



running a train of cars over their line of road in said county of White, "at a place where their road was not securely fenced, ran over and killed, with their engine and cars, one mare and yearling colt, the property of the plaintiff, of the value of two hundred and twenty-five dollars; that the place where said mare and colt entered on the defendant's road was not at the crossing of any public highway, street crossing, or within the corporate limits of any city or incorporated town, but was a place where the company were required by law to fence their road, and a place where they could have fenced their said road."

The second paragraph charged the defendants with running their train of cars over, and, in the same county, killing a heifer belonging to the plaintiff, of the value of forty dollars, on the 5th day of January, 1882.

Separate demurrers were overruled to both paragraphs of the complaint. Issue; trial by the court; finding and judgment for the plaintiff for one hundred and ninety dollars.

It is claimed that the first paragraph of the complaint cannot be construed as averring that the place at which the mare and colt entered upon the railway track was not securely fenced, and that for that reason the demurrer to that paragraph ought to have been sustained.

This appears to us to be a well-grounded objection. It is averred that the mare and colt were killed at a place at which the road was not securely fenced, and that the point at which they entered upon the road was a place where the company were required by law to fence their road, and where it could have been fenced; but these allegations do not amount to an averment that the road was not securely fenced where the mare and colt went upon it. These animals may have gone upon the road at a point at which it was securely fenced, and been killed where it was not so fenced. In such an event the company was not liable for the killing. *Bellefontaine Ry. Co. v. Suman*, 29 Ind. 40; *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324; *Toledo, etc., Ry. Co. v. Howell*, 38 Ind. 447; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107 s. c., 2 Am. & Eng. R. R. Cas. 648.

If the place at which the animals entered was one at which the company were required to keep a fence, and was a place capable of being fenced, the inference ought rather to be that the company had done their duty in regard to fencing the road.

We see no ground upon which the sufficiency of the paragraph in question can be maintained.

The judgment is reversed with costs, and the cause remanded for further proceedings.

**General Reference.**—See *Wabash, St. L. & P. R. Co. v. Trotts*, and note, *infra*.

LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

HALL.

(98 *Indiana Reports*, 245.)

A complaint against a railroad company for killing stock, otherwise sufficient, is not bad for failing to aver that the road could have been fenced at the point where the stock entered upon it.

FROM the Putnam Circuit Court.

A. D. Thomas for appellant.

L. J. Coppage for appellee.

HAMMOND, J.—Action by the appellee against the appellant to recover damages for killing appellee's horse by the appellant's locomotive and cars. The venue on the appellant's motion was changed from the Montgomery Circuit Court to the court below. The trial resulted in a finding and judgment for the appellee. The overruling of the appellant's demurrer to the appellee's complaint is the only ruling complained of. The complaint charged that the railroad was not fenced at the place where the animal entered upon the track and was killed. This was sufficient. *Detroit, etc., R. R. Co. v. Blodgett*, 61 Ind. 815; *Terre Haute, etc., R. R. Co. v. Penn*, 90 Ind. 284; s. c., 15 Am. & Eng. R. R. Cas. 561. If the railroad could not properly have been fenced at the place in question, that was a matter of defence. It was not necessary for the complaint to allege that it could have been fenced at such place. *Fort Wayne, etc., R. R. Co. v. Mussetter*, 48 Ind. 286; *Jeffersonville, etc., R. R. v. Lyon*, 55 Ind. 477; *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107.

The demurrer to the complaint was properly overruled.

Affirmed, at appellant's costs.

General Reference.—See *Wabash, St. L. & P. R. Co. v. Tretta*, and note, *infra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

HARRIGAN.

(94 *Indiana Reports*, 245.)

In an action against a railroad company to recover the value of two horses belonging to the plaintiff, alleged to have been killed by the defendant's locomotive and train of cars, where the complaint charged, *inter alia*, "that the railroad of the defendant was not fenced at the place where said horses got on the track and where said horses were killed," the allegation as to the want of fences is sufficiently definite and certain on a demurrer to the complaint for the want of facts.

A bill of exceptions does not become a part of the record until it has been filed; and, unless the transcript shows the filing of such bill, it cannot be considered by the Supreme Court as constituting a part of the record.

In the absence of the evidence from the record, no available error can be predicated upon the instructions given, unless they are erroneous as mere abstract propositions of law, nor upon the instructions refused, for, even if they state the law correctly, the Supreme Court will presume they were properly refused as inapplicable to the case made by the evidence.

From the Parke Circuit Court.

A. D. Thomas for appellant.

G. W. Paul and J. E. Humphries for appellee.

Howe, C.J.—This was a suit by the appellee to recover the value of two horses belonging to him, alleged to have been killed by the appellant's locomotive and train of cars at a place on the line of its railroad which was not securely fenced. This suit was commenced in the Montgomery Circuit Court and was there put at issue, when, upon the appellant's application, the venue of the cause was changed to the court below. There the issues joined were tried by a jury and a general verdict was returned for the appellee, assessing his damages in the sum of \$300. Over the appellant's motion for a new trial judgment was rendered on the verdict.

In this court the appellant has assigned as errors the decisions of the circuit court (1) in overruling its demurrer to appellee's complaint, and (2) in overruling its motion for a new trial. Appellee's complaint originally contained two paragraphs, but before trial he withdrew the second paragraph, and the cause was tried below upon the issue joined on the first paragraph. The sufficiency of the first paragraph of the complaint, therefore, is the only question presented for our decision by the first alleged error. In the first paragraph of his complaint the appellee alleged that on or about the 17th day of November, 1881, the appellant, by its agents and

employees, was running and operating its line of railroad through Montgomery County; that the appellant, by its agents and employees, then and there ran its locomotive and train of cars upon and killed two horses belonging to the appellee, one of the value of \$250, and the other of the value of \$150; that both of said horses were so run upon and killed as aforesaid, in Montgomery County, without any fault or negligence of the appellee; that the defendant has no fence on either side of said road at the place where said horses got on the track and where said horses were killed; that said defendant has no fence on either side of the said road where said horses were killed; that the railroad of the defendant was not fenced at the place where said horses got on the track, and where said horses were killed;" that appellee was damaged by the killing of his horses in the sum of \$400, which was due and unpaid. Wherefore, etc.

In discussing the sufficiency of appellee's complaint the appellant's counsel claims that the complaint is bad in this, that it fails to show that the railroad track was not securely fenced in at the time when and at the place where the appellee's horses entered upon such track. In the foregoing summary of the complaint we have quoted literally, and placed within the usual quotation marks the averments in regard to time and place. It will be seen therefrom that so far as time is concerned, these averments can be construed as having reference only to the time of filing the complaint, with the exception of the last averment which, by the tense of the verb used, relates to some indefinite time in the past. The record of this cause shows that the complaint was filed and the suit commenced in the Montgomery Circuit Court, on the 26th day of December, 1881; and it was averred therein that the appellee's horses were run over and killed "on or about the 17th day of November, 1881," upon the appellant's railroad track by its locomotive and train of cars. The complaint speaks, as of the date of its filing in the proper court, or clerk's office of the court. Therefore, it is claimed by the appellant's counsel, that the averments in the complaint "that the defendant has no fence," etc., only show that the defendant had no fence on either side of its road, etc., at the time the complaint was filed on the 26th day of December, 1881, but utterly fail to show that the road was not securely fenced in when the appellee's horses were run over and killed on November 17th, 1881, some forty days before the filing of the complaint.

We are not fully convinced by this line of argument; but conceding, without deciding, that the averments last referred to are insufficient, we are of opinion that the last allegation, literally quoted in our summary of the complaint, makes the pleading good at least as against a demurrer thereto for the want of sufficient facts. This allegation was: That the railroad of the defendant

was not fenced at the place where said horses got on the track, and where said horses were killed." Appellant's learned counsel objects to this allegation on the ground that it is too indefinite and uncertain; but such an objection to a pleading, as we have often decided, cannot be reached by a demurrer for the want of facts, and only by a motion to make the pleading or allegation more certain and specific. *Ohio, etc., Ry. Co. v. Collarn*, 73 Ind. 261; *s. c.*, 5 Am. & Eng. R. R. Cas. 554; *State, ex rel., v. Neff*, 74 Ind. 146; *Bryan v. Moore*, 81 Ind. 9.

The demurrer to the complaint was correctly overruled.

Under the alleged error of the trial court in overruling the motion for a new trial, the first question discussed by the appellant's counsel relates to the sufficiency, or, as he claims, the insufficiency, of the evidence to sustain the verdict. Appellee's counsel insist, however, that the bill of exceptions, containing the evidence, is not properly in the record, for the reason that there is nothing in the record showing, or tending to show, that such bill had ever been filed. This point seems to be well made, and must be sustained. It is shown by the record that on the 8th day of May, 1883, the appellant's motion for a new trial was filed and overruled, and sixty days were then given to file bills of exception herein. There is in the record what purports to be a bill of exceptions, containing the evidence, which bill seems to have been signed by the judge, before whom the cause was tried, on the 30th day of June, 1883, and within the time given by the court. But there is no memorandum or file-mark, or recital of any kind, in the transcript before us which shows, or tends to show, that such bill of exceptions was filed in the trial court within the time given, or, indeed, at any time.

In section 629, R. S. 1881, it is provided that a bill of exceptions must be signed by the judge and "filed in the cause," and "When so filed, it shall be a part of the record." In the recent case of *Loy v. Loy*, 90 Ind. 404, this precise question was under consideration, and it was there said: "Where time is given beyond the term in which to file a bill of exceptions, and it appears that the bill was presented to and signed by the judge within the time limited, the record must show, in some manner, that the bill was filed, or it cannot be considered in this court as constituting a part of the record of the cause." In the case at bar, therefore, it must be held that the evidence given on the trial is not a part of the record.

Appellant's counsel next complains in argument of the instructions of the court to the jury, and, also, of the court's refusal to give the jury other instructions at the appellant's request. All these instructions, as well those refused as those given, were made part of the record by bill of exceptions, filed in time and properly in the transcript. In the absence of the evidence from the record,

however, we cannot say that the court erred, either in giving or in refusing to give instructions to the jury. None of those given seem to be erroneous, as mere abstract propositions of law; and, in the condition of the record, it cannot be said that they were not applicable to the case made by the evidence. Nor can it be said that the court erred in its refusal to give the instructions asked for by the appellant; for, if it be conceded that the instructions asked for stated the law correctly, yet, in the state of the record, we are bound to conclude that they were properly refused, because they were inapplicable to the case shown by the evidence; in other words, the record of this cause fails to show that the trial court erred in any of the rulings complained of by the appellant, and, in the absence of such a showing, it is conclusively presumed by this court that such rulings were not erroneous. *Myers v. Murphy*, 60 Ind. 282; *Bowen v. Pollard*, 71 Ind. 177; *Loy v. Loy*, *supra*.

The judgment is affirmed, with costs.

**General Reference.**—See *Wabash, St. L. & P. R. Co. v. Tretta*, and note, *infra*.

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## WABASH, ST. LOUIS AND PACIFIC RY. CO.

v.

TRETTS.

(96 *Indiana Reports*, 450.)

The refusal to strike out part of a complaint is a harmless error.

In a suit, under the statute, against a railroad company for killing stock, the material question is as to the fence at the place where the animals entered, and not at the place where they were killed.

The obligation of a railroad company to fence its track exists except at places where a fence would impair the use of private property or the rights of the public, and it includes the duty of maintaining cattle-guards where they are necessary and proper to prevent access from intersecting highways.

To present any question to the Supreme Court as to admitting evidence, objection must be specifically stated to the court below and shown by bill of exceptions.

The court may refuse to send interrogatories to the jury which the attorney of the opposite party has had no opportunity to see until after he has closed his argument.

FROM the De Kalb Circuit Court.

C. B. Stuart, W. V. Stuart, and J. E. Rose for appellant.

C. Emanuel for appellee.

**ELLIOTT, C.J.**—This action was brought by appellee to recover the value of a mare, alleged to have entered upon appellant's track



at a point where it was not fenced, and to have been killed by the appellant's locomotive.

A motion to strike out part of the complaint was overruled, and this ruling is assigned as error. Many cases decide that such a ruling, even though erroneous, will not warrant a reversal.

The place of entry is the material question in cases of this character. If animals enter at a place where the railroad company was bound to fence, the company is liable, although they were killed at a point where the company was under no duty to fence. *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *Ohio, etc., Ry. Co. v. Miller*, 46 Ind. 215; *Jeffersonville, etc., R. R. Co. v. Avery*, 31 Ind. 277; *Indianapolis, etc., R. R. Co. v. Adkins*, 23 Ind. 340. There was some conflict in the evidence in this case as to whether the place where appellee's mare entered upon the railroad track was one which the company was bound to fence, but we do not feel at liberty to disturb the verdict. It appears that the predecessor of appellant had for nine years kept the fence along the track where the mare entered, and that appellant had suffered it to become insecure. This, in connection with other evidence in the case, warranted the jury in inferring that the place was one which might have been fenced.

The statute makes no provision as to the places which may be left unfenced, but the courts, recognizing the necessity of excepting streets of towns and cities, and places where the business of the railroad companies demands that no fences be made, have engrafted exceptions upon the statute. These exceptions have been made, not to advance the private interests of railroad corporations, but to promote the public good by enabling the corporations to discharge their duty to the public. These exceptions exist only in cases where a necessity is shown. It was said in *Pittsburgh, etc., Ry. Co. v. Laufman*, 78 Ind. 319, that "it is not the province of the courts to create exceptions to the rule, or to interfere with the legislative policy, upon the ground suggested, or for any like reason." The ground referred to by the court was, that as the track was through a town, numerous cattle-guards would weaken it. Many cases are cited, and we add *Indianapolis, etc., Ry. Co. v. Thomas*, 84 Ind. 194, where it was said: "For the exception is made because the general public have an interest in the proper operation of such great means of traffic and transportation, and not because the interests of the railroad corporation will be promoted." It must always appear from the evidence that there was a sufficient reason for not obeying the statute. The court said in *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426: "That the track of the road was not fenced at the place in question, is clearly shown; and the evidence falls far short of showing a good reason for not having fenced it." Again, it was said in *Wabash, etc., Ry. Co. v. Forsee*, 77 Ind. 158: "But whenever a railroad company can build

and maintain such a fence, without interfering with the rights of the public or with the free use of private property, then it is bound to maintain the fence, whether it be in a city, or village, or in the country. *The Ohio, etc., Ry. Co. v. Rowland*, 50 Ind. 349."

Where cattle-guards are necessary to keep animals from the track, it is the duty of railroad companies to construct them, unless some sufficient reason is shown excusing them from the performance of this duty. In *Grand Rapids, etc., R. R. Co. v. Jones*, 81 Ind. 523, the court said: "No railroad can be said to be securely fenced at an established crossing, where suitable cattle-pits have not been constructed." It was said in another case: "It is as much the duty of the appellant to fence against animals on the highway as against animals in adjoining fields or woods." *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169, *vide* authorities cited, p. 173.

In order to save questions upon rulings admitting evidence, specific objections must be stated to the trial court and incorporated in the bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98).

In so far as the sixth instruction asked by appellant stated the law correctly, it was embodied in the instructions given at the request of the appellant and those given by the court on its own motion. There was, consequently, no error in refusing the instruction designated.

After the argument had commenced, appellant presented to the court interrogatories, and requested that they should be propounded to the jury, but the court denied the request. It is not shown at what stage of the argument they were presented, but it is affirmatively shown that the counsel for appellee had no opportunity to see them until after he had concluded his argument. We think the court did right in refusing appellant's request. *Glasgow v. Hobbs*, 52 Ind. 239.

Judgment affirmed.

**Company only Liable for Injury when Bound to Fence at Point where Cattle Enter.**—When cattle come upon the track at a point where the railroad company is not bound to fence, the company is not liable for injury to them wherever it occurs. *Indianapolis, C. & L. R. Co. v. Warner*, 85 Ind. 515; *Jeffersonville, M. & L. R. Co. v. Huber*, 42 Ind. 173; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Illinois Central R. Co. v. Bull*, 72 Ill. 587; *Smith v. Chicago, etc., R. Co.* 84 Iowa, 506; *Schneir v. Chicago, etc., R. Co.*, 40 Iowa, 337; *Peoria, etc., R. Co. v. Barton*, 80 Ill. 72; *Wier v. St. Louis, etc., R. Co.*, 48 Mo. 558; *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549; *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; s. c., 2 Am. & Eng. R. R. Cas. 648; *Snider v. St. Louis, etc., R. R. Co.*, 7 Am. & Eng. R. R. Cas. 558.

**Pleading and Evidence.**—It is therefore necessary to aver in the complaint and to prove that the cattle came upon the track at a point where the railroad company was bound to fence but failed to do so. *Morrison v. New York, etc., R. Co.*, 32 Barb. (N. Y.) 568; *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Jeffersonville, etc., R. Co. v. Brevoort*, 30 Ind. 824; *Toledo, etc. R. Co. v. Howell*, 38 Ind. 447; *Jeffersonville, etc., R. Co. v. Lyon*, 72 Ind. 107; s. c.,

2 Am. & Eng. R. R. Cas. 648; St. Louis, Iron Mt. & S. R. Co. v. Nance, 79 Mo. 196; s. c., *supra*; St. Louis, Iron Mt. & S. R. Co. v. Asher, 79 Mo. 432; s. c., *supra*; Louisville, N. A. & C. R. Co. v. Quade, 91 Ind. 295; s. c., *supra*; Louisville, N. A. & C. R. Co. v. Hall, 93 Ind. 254; s. c., *supra*; Louisville, N. A. & C. R. Co. v. Harrigan, 94 Ind. 245; s. c., *supra*; Wabash, St. L. & P. R. Co. v. Tretts, 96 Ind. 450; s. c., *supra*.

But see Fickle v. St. Louis, etc., R. Co., 54 Mo. 219; Walther v. Pacific R. Co., 55 Mo. 276. Indianapolis & Vincennes R. Co. v. Sims, 92 Ind. 496; s. c., *infra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO RY. Co.

v.

ARGENBRIGHT.

(98 Indiana Reports, 254.)

In an action under the statute, before a justice of the peace, against a railroad company for killing stock, a complaint is not bad for failure to allege that the road was not fenced where the animal entered upon the track; nor for failure to show by direct averment that the plaintiff was damaged; or that the damages are due and unpaid, where the value of the stock killed is alleged.

FROM the Floyd Circuit Court.

A. Dowling for appellant.

G. B. Cardwill for appellee.

HAMMOND, J.—Action by the appellee to recover damages for killing her cow by the appellant's locomotive. It is averred that the railroad was not fenced where the animal was killed, but there is no averment that it was not fenced at the point where it entered upon the track. The latter allegation is essential in cases commenced in the circuit court, but as to cases like the present, begun before a justice of the peace, the complaint is good without such averment. Ohio, etc., Ry. Co. v. Miller, 46 Ind. 215; Ohio, etc., Ry. Co. v. McClure, 47 Ind. 317; Wabash Ry. Co. v. Forsee, 77 Ind. 158; Indianapolis, etc., R. R. Co. v. Sims, 92 Ind. 496; s. c., *supra*.

It is also objected to the complaint that it "did not aver that the plaintiff was damaged by the killing of the cow, nor that any damages were due, nor that they were unpaid." It is alleged that the animal was of the value of one hundred dollars, and was killed. This shows that the plaintiff was damaged, and in such case the direct charge that the injury was to the plaintiff's damage, etc., is not essential. Kent v. Cantrall, 44 Ind. 452.

The rule that a complaint based upon contract must allege

directly or show by necessary inference that the plaintiff's claim is due and unpaid, does not apply to an action for tort. The appellee recovered judgment in the court below, to which the appellant had appealed from the justice, in the sum of one hundred dollars. It is claimed this was excessive. If we were governed by the weight of evidence as it appears in the record, we would probably have to say that the cow was not worth more than seventy-five dollars. There was, however, evidence tending to show that she was worth one hundred, and even one hundred and fifty dollars, and we cannot, therefore, under well-established rules of practice, reverse the judgment on account of the amount of the recovery.

The learned counsel for the appellant, in urging that the evidence fails to show that the railroad was not fenced at the point at which the animal entered upon it, has inadvertently overlooked the testimony of one of the appellee's witnesses, who testified clearly and explicitly that the railroad was not fenced at that place.

The record discloses no error. Affirmed, with costs.

**Pleadings in Action before Justice of the Peace.**—In an action before a justice of the peace to recover damages from a railroad company for killing cattle, it is not essential that the pleadings should be as full as in the case of an action instituted in an ordinary court. The complaint must, however, substantially set forth the cause of action. *Norton v. Hannibal, etc., R. Co.*, 48 Mo. 387; *Wood v. St. L., etc., R. Co.*, 58 Mo. 109; *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 23; *Toledo, etc., R. Co. v. Cole*, 50 Ill. 185; *Indiana, etc., R. Co. v. Leamon*, 18 Ind. 173; *Bellefontaine R. Co. v. Read*, 38 Ind. 477; *Indianapolis, etc., R. Co. v. Hamilton*, 44 Ind. 76; *Housatonic R. Co. v. Waterbury*, 28 Conn. 101; *Pittsburgh, etc., R. Co. v. Hannon*, 60 Ind. 417; *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566; *Indianapolis, etc., R. Co. v. Candee*, 60 Ind. 112; *Razor v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 562; *Key v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 565; *Rowland v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 566; *Wilcox v. Toledo, etc., R. Co.*, 9 Am. & Eng. R. R. Cas. 518; *Chicago, R. I. & P. R. Co. v. King*, 79 Mo. 328; *Louisville, N. A. & C. R. Co. v. Zink*, 92 Ind. 406; *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496; *Penna. Co., et al. v. Rusie*, 95 Ind. 286; *Louisville, N. A. & C. R. Co. v. Argonbright*, 98 Ind. 254; s. c., *supra*.

**General Reference.**—As to the ordinary rules of pleading in cases like the above, see *Wabash, St. L. & P. R. Co. v. Tretta*, and note, *supra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

HARRINGTON.

(92 *Indiana Reports*, 457.)

A complaint for killing an animal, under section 4025, R. S. of Indiana 1881. good in other respects, which avers that the defendant "ran against and over said mare and killed her," not showing that the injury was done by the locomotives, cars or other carriages run upon the road, is good after verdict.

FROM the Carroll Circuit Court.

W. F. Stillwell for appellant.

J. Applegate and C. R. Pollard for appellee.

NIBLACK, J.—This was an action by Abraham Harrington against the Louisville, New Albany & Chicago Ry. Co., commenced in the superior court of Tippecanoe County and taken by change of venue to the Carroll Circuit Court, where upon a trial there was a verdict for the plaintiff assessing his damages at \$112.50. Motion in arrest of judgment overruled, and judgment on the verdict.

The only error assigned is that the complaint did not state facts sufficient to constitute a cause of action against the appellant. With some verbal changes of a merely formal character, the complaint was as follows:

"The plaintiff complains of the defendant and says that at the time hereinafter mentioned the defendant, . . . a corporation duly organized, . . . was the owner of a certain railroad known as the Louisville, New Albany & Chicago Ry. together with the track, cars, locomotives and other appurtenances thereto belonging; that on or about the 10th day of April, 1882. the plaintiff was the owner and possessed of a certain mare of the value of \$125, and which mare casually and without the fault of the plaintiff, strayed in and upon the track and ground occupied by the railroad of the defendant, at a point about one half mile north of the city of Lafayette in the county of Tippecanoe, where said railroad was not securely fenced in, . . . and at a point on said railroad where the same could have been securely fenced in, and such a fence properly maintained by the defendant. And the plaintiff further alleges that said defendant, by its agents and servants, ran against and over the said mare of the plaintiff and killed and destroyed the same, to the damage of the plaintiff \$125."

The objection made to the sufficiency of the complaint is that it did not aver that the mare was run over and killed by the cars, locomotive or other carriage of the defendant, referring to section 4025, R. S. 1881, under which this action is prosecuted.

It is true, that the averment in the complaint, relating to the manner in which the mare was killed, did not bring this case fully within the provisions of the section of the statute referred to, which makes railroad companies liable in certain cases for stock killed or injured by their locomotives, cars or other carriages, and if objection had been made to the complaint on that account in the court below before going to trial, that court would doubtless have held the objection well taken, for, at least, uncertainty in the averment. But taking into consideration the universally admitted purposes for which railroad companies are organized, and the uses for which railroads are constructed, in connection with the preceding averments of the complaint, we think the reasonable inference is, and that the fair intendment of the averment was, that the mare was run over and killed by some vehicle or other machinery belonging to the defendant and in use upon its railway track.

If we are correct in this construction of the complaint, and we feel justified in assuming that we are, the defect complained of was cured by the verdict, and cannot now be made, in any way, available to reverse the judgment by raising the question of the sufficiency of the complaint for the first time in this court. *Peck v. Martin*, 17 Ind. 115; *Alford v. Baker*, 53 Ind. 279; *Scott v. Zartman*, 61 Ind. 328; *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294; *Evansville, etc., R. R. Co. v. Willis*, 80 Ind. 225; *Yeoman v. Davis*, 86 Ind. 189.

The cases of *Pittsburgh, etc., Ry. Co. v. Troxell*, 57 Ind. 246; *Pittsburgh, etc., Ry. Co. v. Hannon*, 60 Ind. 417; and *Ricketts v. Sandifer*, 69 Ind. 318, cited in support of the objection made to the complaint, have as precedents no practical application to the case in hearing. In each of those cases the complaint failed to charge in any suitable way, that the defendant had committed the wrongful act complained of. Besides, in each case the sufficiency of the complaint was challenged before going to trial.

The judgment is affirmed, with costs.

**General Reference.**—See as to injuries to cattle otherwise than by direct contact with train, *Croy v. Louisville, N. A. & C. R. Co.*, and note, *infra*.



CROY

v.

LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

(97 *Indiana Reports*, 126.)

In order that the special findings of a jury in answer to interrogatories may control the general verdict, they must be irreconcilably inconsistent therewith.

In order to entitle the plaintiff to a judgment on the special findings notwithstanding the general verdict, all material facts must appear in the finding.

In a suit against a railroad company for injury to cattle by cars, proof must be made that the injury occurred in the county where suit is brought. This is a jurisdictional fact.

In such a suit there must be proof of direct injury—proof that the animal was actually touched by the locomotive or cars.

Where a railroad company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable under the statute for injury to cattle.

FROM the Montgomery Circuit Court.

G. W. Paul, M. D. White and J. E. Humphries for appellant.  
A. D. Thomas for appellee.

BLACK, C.—The appellant brought his action against the appellee to recover, under the statute, damages for the injuring of cattle by running a locomotive and train of cars upon them.

A general verdict for the defendant was returned, with answers to interrogatories, which were propounded to the jury by each party. The plaintiff moved for judgment upon the answers to the interrogatories, notwithstanding the general verdict. This motion was overruled, as was also the plaintiff's motion for a new trial.

In order that the special findings of a jury in answer to interrogatories may control the general verdict, they must be irreconcilably inconsistent therewith.

To entitle the plaintiff to recover, it was necessary that there be proof of the fact, alleged in the complaint and denied in the answer thereto, that the animals were injured in the county in which the action was brought. *Evansville, etc., R. R. Co. v. Epperson*, 59 Ind. 438; *Louisville, etc., Ry. W. Co. v. Breckenridge*, 64 Ind. 113; *Louisville, etc., Ry. Co. v. Davis*, 83 Ind. 89. This jurisdictional fact was not shown by the special findings.

The statute, R. S. 1881, section 4025, *et seq.*, gives the right of action for the killing or injuring of animals by the locomotives, cars or other carriages used on the railroad, and this is construed to require proof of direct injury—proof that the animal for the

killing or injuring of which action is brought was actually touched by the locomotive, cars or other carriages. Indianapolis, etc., Ry. Co. v. McBrown, 46 Ind. 229; Louisville, etc., Ry. Co. v. Smith, 58 Ind. 575. It was not shown by these special findings, that the animals were struck, or touched, or killed, or injured by the locomotive, cars or other carriages, or even that they were injured or killed upon the railroad track.

Unless all the material facts of the cause of action were proved, the verdict could not be otherwise than for the defendant. We cannot look to the evidence in reviewing the ruling upon a motion for judgment on the answers of the jury to interrogatories, notwithstanding the general verdict.

Facts necessary to the plaintiff's recovery not being shown by the special findings, he could not have judgment thereon over the general verdict for the defendant.

The evidence showed that the animals entered upon the railroad at night, by escaping from the plaintiff's inclosed field in which they were pasturing; that the fence along the east side of this field, over which the animals passed, was a good rail fence, maintained by the plaintiff, nine or ten rails high, and such a fence as was used by good husbandmen of the neighborhood; that at the place where the animals entered, this fence was twenty-four feet from the railroad track, and that a fence extended in an unbroken line along the west side of the railroad for about three-fourths of a mile northward and the same distance southward from the place of entry. The railroad, constructed many years before, was located, by permission of the board of county commissioners entered of record, upon a State road leading from Crawfordsville to Lafayette, commonly known as "the turnpike." There was also a fence east of the railroad opposite the place where the cattle entered and about forty-eight feet distant from the railroad track, and this fence like that on the west side, extended northward and southward to intersecting county roads running east and west, the place being called "Croy's Lane." There was no evidence of a vacation of this State road; on the contrary, it was shown that it was still used as a highway and worked as such by the road supervisors. At the place where the animals entered, the wagon track ran along on the east side of the railroad track and about twenty-five feet from it. At the distance of a half a mile southward, the wagon track crossed the railroad track and ran along the west side thereof. The fences along this highway were situated substantially as they were when the railroad was constructed, and the adjoining proprietors continued to use the highway and had no other outlet from their farms. Immediately opposite the place where the animals entered, the railroad ran through a cut three and one half feet deep, and the track of the railroad could not be used for the passage of wagons thereon.

Counsel for the appellant insist that the appellee was liable under the statute, because the railroad was not "fenced in" by means of fences on both sides of the railroad track connected with cattle-guards and separating it from the wagon-track.

It is not necessary to decide a question argued by counsel, whether under the statute a railroad company is liable for killing or injuring by its train animals which entered upon the railroad by passing over a good fence extending along one side of the railroad, and not maintained by the railroad company, at a place where it was possible to fence in the railroad without interference with the rights of the public or those of the railroad company, but it was not fenced in.

Before this railroad was constructed, the place upon which the appellant's cattle entered was a public highway, over every part of which travellers were entitled to pass. When the railroad company made its track there, it had no right to further obstruct the highway by erecting fences and constructing cattle-guards thereon.

A railroad company is liable for failure to fence private ways. *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380. But the appellee had no right by fencing in its track to exclude the proprietors along the Croy Lane from the use of the highway or to close their private passage-ways to and from it.

This court has already decided that at the particular place where the appellant's animals were injured, the appellee is not bound to fence in its right of way, and that the appellee is not liable under the statute for killing or injuring animals there. *Louisville, etc., Ry. Co. v. Francis*, 58 Ind. 389; *Louisville, etc., Ry. Co. v. Wy-song*, 58 Ind. 597.

The cases of *Louisville, etc., Ry. Co. v. White*, 94 Ind. 257, and *Louisville, etc., Ry. Co. v. Shanklin*, 94 Ind. 297, did not overrule the cases above cited from 58 Ind., but were decided upon a state of facts, shown by the evidence, different from those upon which this decision proceeds.

As there could be no recovery by the appellant under the evidence, it is wholly immaterial whether or not there was any error in the giving or refusing of instructions to the jury.

**PER CURIAM.**—Upon the foregoing opinion, the judgment is affirmed, at the appellant's costs.

**Jurisdiction.**—An action against a railroad company for an injury to cattle, occasioned by a failure to construct a statutory fence, must ordinarily be brought in the courts of the county where the injury occurred. *Missouri Pac. R. Co. v. Wade*, and note, *supra*.

**Injuries to Cattle otherwise than by Contact with Train.**—In Indiana it has been held that the statute requiring railroad companies to fence their roads gives no right of action where cattle are killed otherwise than by actual contact with the engines and cars of the company. *Peru, etc., R. Co. v. Hasket*, 10 Ind. 409; *Ohio, etc., R. Co. v. Cole*, 41 Ind. 331; *Indian-*

spoils, etc., R. Co. v. McBrown, 46 Ind. 229; Louisville, etc., R. Co. v. Smith, 58 Ind. 575; Baltimore, etc., R. Co. v. Thomas, 60 Ind. 107.

The law is to the same effect in Missouri, New York, and some other States. Lafferty v. Hannibal, etc., R. Co., 44 Mo. 292; Moshier v. Utica, etc., R. Co., 8 Barb. 428; Seibert v. Missouri, etc., R. Co., 6 Am. & Eng. R. R. Cas. 584; Holder v. Chicago, St. L. & N. O. R. Co., 11 Lea (Tenn.), 176; s. c., 18 Am. & Eng. R. R. Cas. 567; Schertz v. Indianapolis, B. & W. R. Co., 107 Ill. 577; s. c., 15 Am. & Eng. R. R. Cas. 528.

In other States it has been held that there may be a recovery whether the injury is occasioned by actual contact with the train or not. Atchison, T. & S. F. R. Co. v. Jones, 20 Kans. 527; Atchison, T. & S. F. R. Co. v. Edwards, 20 Kans. 531; Young v. St. Louis, etc., R. Co., 44 Iowa, 172; Houston, etc., R. Co. v. Perry, 42 Tex. 451.

And see Savage v. Chicago, M. & St. P. R. Co., 18 Am. & Eng. R. R. Cas. 566.

## ST. LOUIS AND S. F. RY. CO.

v.

RITZ.

(*Advance Case, Kansas. April 10, 1885.*)

In an action by the owner of a crop to recover damages against a railway company for failing to construct and maintain proper and sufficient cattle-guards where its railroad passes through the inclosure in which the crop is growing, the plaintiff is entitled not only to compensation for the crop actually destroyed, but also to reasonable compensation for the time and labor necessarily expended in any ordinary and reasonable effort to protect his crop, and to prevent further and additional damages thereto; but he ought not to be allowed compensation beyond the injury or loss that might have been occasioned had no such effort been made.

Upon the question of whether the cattle-guards were proper and sufficient to complete the inclosure, and prevent domestic animals crossing the same, the opinions of witnesses are not admissible; but when the facts relating to their construction and condition are shown, the jury are capable of forming a correct judgment regarding their sufficiency.

Where the findings of a jury are fairly susceptible of two interpretations, that one should be given which makes them concordant with each other, and which supports the general verdict, rather than an interpretation which would overturn and destroy the general verdict.

**ERROR from Greenwood County.**

S. S. Kirkpatrick for plaintiff in error.

Clogston & Fuller for defendant in error.

JOHNSTON, J.—A. G. Ritz brought his action in the district court of Greenwood County against the St. Louis & San Francisco Ry. Co., to recover damages which he suffered, and was occasioned, as he alleges, by the failure of the railway company to construct

and maintain proper cattle-guards where its road entered and left the plaintiff's inclosure. The railroad of the defendant passes through plaintiff's farm, where a crop of corn was growing, and he alleges that by reason of the railway company's neglect and refusal to make and maintain proper guards, a large number of cattle and horses entered upon his premises over the defective guards, which ate up and destroyed corn of the value of \$175; and he also claims that by reason of the defendant's neglect in this regard he necessarily expended, in an effort to save his crop from destruction, the sum of \$175, for which he asked judgment. A trial was had with a jury, resulting in a verdict and judgment for the plaintiff in the sum of \$221. The railway company brings the case here, assigning several errors, which will be briefly noticed:

1. It is first urged that the court erred in sustaining an objection to the question asked T. J. Kelley, a section foreman of the railway company, who was engaged upon the section of the railroad passing through plaintiff's land. After showing that he was experienced in railroading, and in the building and repairing of cattle-guards, and also that he was acquainted with the cattle-guards in question, the inquiries were made, if, in his opinion, the cattle-guards in question were properly constructed; were the cattle-guards constructed in the usual and ordinary way of constructing cattle-guards by railways; and if it was possible to construct a guard that would prevent breachy stock from crossing it.

These questions called merely for the opinion of the witness, and we think there was no error in excluding them from the jury. As a general rule, opinions of witnesses are not admissible in evidence. The facts should be stated, and leave the jury to draw inferences and form opinions upon the facts. There are exceptions to this rule, as upon a question of skill or science, or where the subject-matter of inquiry is of such a character that jurors not having experience would not be apt to reach a correct judgment without the aid of expert testimony. But we think the case at bar does not come within any of the exceptions. Cattle-guards are in such common use, and are so simple in construction, that practical business men of common experience, when given the facts, can, without the aid of opinion, reach a correct conclusion as to whether the guards were proper and sufficient to complete the inclosure. A jury, coming as it does from the body of the people, many of whom are necessarily familiar with the habits of domestic animals, and with what is necessary to restrain them, is probably more capable of determining whether a cattle-guard is proper and sufficient to prevent stock from crossing it than the man who is experienced only in building cattle-guards.

The supreme court of New York has passed upon this question, and held that the inquiry of whether a cattle-guard on a railroad is properly constructed is not the subject of expert testimony, but

that when the manner of construction is shown, the jury is competent to determine whether it is suitable and sufficient, without opinion evidence. In deciding the question the court say "that when the manner of its construction was shown, the jury was competent to speak of its fitness for use, as was any person engaged in its construction, or in the construction of such guards, however numerous. It does not require experience in the construction of cattle-guards to know that if the timbers composing the superstructure are so near each other that the feet of horses or cows will not pass between them, the guard furnishes no obstruction to cattle desiring to pass over it. If the opening between the timbers is only two inches, and the animal's foot is five inches in length, it can pass almost as easily as if the timbers were in actual contact. No amount of opinions could justify the finding that a cattle-guard so constructed was fit for the use for which it was constructed, however skilful and competent the witness might be." *Swartout v. Railroad Co.*, 7 Hun, 571; *Rog. Exp. Test.* 10; *Lawson, Exp. & Op. Ev.*, rule 24; *St. Louis & S. F. Ry. Co. v. Edwards*, 26 Kan. 72; *Enright v. Railroad Co.*, 33 Cal. 236.

The facts in regard to the manner in which the guards were constructed, and in respect to whether they served to complete the enclosure and obstruct cattle from passing within, were not only available, but were fully offered in evidence. The testimony tended to show that the pits underneath the guards were only from 14 to 16 inches deep, and some of the timbers across the pits were so close together that the foot of a horse or cow could not pass between them, and that cattle crossed over them with but little difficulty. Altogether, the testimony abundantly shows that they were insufficient.

2. It is next urged as error that the jury assessed damages against the railway company for the injury done to plaintiff's corn by stock which entered his enclosure at points other than over the alleged defective cattle-guards. Of course, the company cannot be held liable in this action beyond the damage caused by its failure to construct and maintain proper cattle-guards. It is true, there was some testimony to the effect that stock once gained an entrance into plaintiff's corn-field through the fence, and the jury, in answer to special questions, say that 575 bushels of corn were destroyed by cattle and other animals on the plaintiff's premises, and that the damages sustained by plaintiff by reason of this injury to his corn was \$161. In their general verdict they evidently allowed the plaintiff this amount for damages done to the corn by the railway company. The special questions immediately preceding these, however, related to stock which came into plaintiff's enclosure over the defective cattle-guards, and obviously the corn referred to by the jury in their answers was that which was destroyed by the cattle that crossed over the defective guards. The jury had been



specially charged that the railway company was not liable for injury done by cattle crossing at other points. The findings, when read together, will fairly bear the interpretation that the jury only took into account and computed, in their allowance to the plaintiff, the injury done to the plaintiff's corn by cattle crossing over the cattle-guards; and where a finding of fact made by the jury is susceptible of two interpretations, that one should be given it which would make it consistent with the other findings, and with the general verdict, rather than an interpretation which would overturn and destroy the general verdict. *Simpson v. Greeley*, 8 Kan. 586.

3. It is finally urged that the court erred in telling the jury that, in addition to the value of the corn destroyed, the owner of the crop can recover a reasonable compensation for the time and labor necessarily expended in trying to protect his crops from injury by guarding the opening in the enclosure caused by the defective cattle-guards, and erred in including such compensation in the judgment rendered. This rule was enunciated by the court in the case of *St. Louis & S. F. Ry. Co. v. Sharp*, 27 Kan. 134, and of its correctness and justness we have no question. In that case it was said:

"An owner of the crops upon ascertaining that injuries were being done thereto by the cattle and other animals which had entered at the places where the railway company had failed to erect suitable cattle-guards, was bound to use proper diligence to prevent further injuries to his crops."

This duty being enjoined upon the plaintiff, the expense necessarily incurred in its performance is the natural and direct consequence of the neglect of the railroad company, and for which it should be held liable. Counsel say that under this rule there would be no limit to the expense which the owner of the crop might incur in an effort to protect his crops, and that the expense might even be made to exceed the value of the crop, or the injury which could have been done had not the effort to protect the crop been made. He is only entitled to reasonable compensation for the time and labor necessarily expended in a reasonable effort to protect his crops, and would not be entitled to compensation beyond the damage which might be done by reason of the railroad company's neglect. For instance, if the extent of the injury which could be done to his property by the failure of the railway company to maintain proper cattle-guards did not exceed \$500, he could not recover for time and labor spent in protecting such property an amount exceeding that sum. The rule requiring the owner of the crop to use an ordinary and reasonable effort to protect his crop, and giving him compensation therefor, must generally operate beneficially in the interests of the railroad company, whose neglect makes such expense necessary. The effort must generally have

the effect of preventing greater injury and loss, and to that extent reduces the amount for which the company would be liable.

In Iowa, under a like statute, the supreme court has well said: "That there was no error in an instruction given, to the effect that a plaintiff might recover as damages a reasonable compensation for time and labor necessarily expended in trying to save his crops from destruction. If he, in the exercise of ordinary efforts to prevent the destruction of his crops because of defendant's fault, expended money or labor, he should be compensated therefor. This is one of the natural and ordinary consequences of the neglect of the appellant to comply with the statutory requirement to put in the cattle-guard; and if plaintiff is not allowed to recover for this, the law fails to compensate him fully for the injury inflicted, while it required at his hands the performance of this duty. So, also, if his cattle were necessarily injured because of the failure of defendant to put in the cattle-guard, the plaintiff should, upon the same principle of compensation, be allowed to recover therefor." *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa, 518.

The authorities cited by counsel for the railway company contain nothing inconsistent with this rule, or the views herein expressed. Seeing no error in the record, the judgment of the court below must be affirmed.

**Injuries to Crops.**—As to injuries to crops caused by defects in statutory fences or cattle-guards and the liability of the railroad company therefor, see *Chicago, R. I. & P. R. Co. v. Clare*, and note, *infra*.

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RARIDON

v

CENTRAL IOWA RY. CO.

(*Advances Case, Iowa. April 8, 1885.*)

A petition that alleges, in an action against a railroad company, that said company neglected and refused, for the period of about one year, to place cattle-guards at the proper places on its right of way through plaintiff's lands, and that by reason of said failure and neglect his fields were thrown open to the public, and that his grass and corn-stalks that he had been saving for his cattle were thereby destroyed and lost to him, and that he could not prevent the said loss, *held* not demurrable, on the ground that it claims remote damages, as the question of what actual damage was sustained was a matter to be proved by evidence at the trial.

APPEAL from Jasper circuit court.

This is an action at law by which the plaintiff seeks to recover damages of the defendant for its failure to put in cattle-guards

where the railroad of defendant enters and leaves the fenced and improved lands of the plaintiff. There was a demurrer to the petition, which was sustained, and the plaintiff appeals.

A. R. Campbell and Alanson Clark for appellant.

J. H. Blair and A. C. Daly for appellee.

**ROTHROCK, J.**—The petition and the amendment thereto set forth in substance that the defendant's railroad was lawfully constructed over and across the plaintiff's farm, and that by the construction of the road the plaintiff's inclosed and fenced fields were thrown open, and that defendant neglected and refused for the period of about one year to place cattle-guards at the proper places, and that by reason of said failure and neglect the plaintiff's fields were thrown open to the public; that plaintiff had on his farm 103 acres of heavy grass, of the value of \$2.50 per acre, and 30 acres of corn-stalks, of the value of \$1 an acre, for the winter of 1882-83, and the value of the same was destroyed; that he owned 100 cattle, for which he had saved said grass and stalks, and that he could not turn his herd into said pasture because of said openings in the fences; and that he could not protect himself from the loss of the pasture by any reasonable means. He claimed damages in the sum of \$300.

The demurrer was to the effect that the petition failed to show that the neglect to put in cattle-guards resulted in depriving the plaintiff of the use of his winter pasture, and failed to state any fact showing how such failure to put in cattle-guards resulted in any legal damage to the plaintiff; and that the facts pleaded show that the plaintiff's loss of his pasture resulted from his groundless fears and voluntary omission to feed and use the same; and that the damages sought to be recovered are remote, speculative, and consequential.

The statute requires that every railroad company shall make proper cattle-guards where its railway enters or leaves any improved or fenced land, and shall be liable for all damages sustained by reason of such neglect and refusal. Code, §1288. And the owner of the land has no legal right to construct cattle-guards across the track, and is not bound to do so to protect himself from damages by reason of the want thereof. *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 96; s. c., 14 Am. & Eng. R. R. Cas. 317. Under the averments of the petition, the plaintiff was entitled to recover whatever damages, if any, he fairly sustained by reason of his land having been thrown open and left unfenced; and he cannot recover damages which he might have prevented by reasonable care.

In *Smith v. Chicago, C. & D. R. Co.*, 38 Iowa, 518, where the plaintiff, after the construction of the railroad, planted crops, which were destroyed by cattle by reason of the neglect to construct cat-

tle-guards, it was held that the measure of damages was the market value of the crops when matured, less the expense of fitting them for market from the time of the injury, less whatever the value of the portion saved, if any, may be.

In *Donald v. St. Louis, K. C. & N. Ry. Co.*, 44 Iowa, 157, where a crop of corn was damaged by cattle to the extent of 150 bushels, by reason of the neglect to build cattle-guards, it was held that the measure of damages was the value of corn destroyed. In that case it was claimed that the plaintiff should have allowed the premises to remain uncultivated, and that the proper measure of damages is the rental value of the land; but this court ruled otherwise, upon the ground that it was defendant's duty to erect cattle-guards, and plaintiff had a right to suppose this duty would be performed.

In the case at bar the plaintiff claims damages for the total loss of his grass and corn-stalks, and alleges that they were entirely worthless by reason of the failure and neglect of the defendant to put in the cattle-guards. It is easy to see that they were of less value than they would have been if the land had been inclosed. How much less value they would have been is a question to be determined upon the proof on the trial. The fact that a claim is made for more damages than a party is entitled to, is no ground for demurrer. The question as to whether he should have used the pasture and stalks so far as he could do so, and what interference with the use, or how much was destroyed by other stock pasturing on the same, and all such considerations, are mere matters of evidence.

We think the demurrer should have been overruled. **Reversed.**

**Injuries to Crops.**—As to injuries to crops occasioned by a failure to erect a statutory fence and the liability of the company therefor, see *Chicago, R. I. & P. R. Co. v. Clare*, and note, *infra*.

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### VICKSBURG AND MERIDIAN R. R. Co.

v.

DIXON.

(61 *Mississippi Reports*, 119.)

A railroad company which neglects when notified to mend a cattle-guard across its road-bed is not liable for damage resulting to a crop, although it has for thirty years repaired the guard, which it built at the request of the protected land-owner.

**APPEAL** from the Circuit Court of Hinds County.

In this action for the destruction of the appellee's crops by hogs a jury was waived, and the court gave judgment against the

appellant upon the following state of facts: When the land was wild, a right of way was purchased for the railroad. Afterward the appellee bought property on either side of this grant, and in 1853 began to deaden the forest. He inclosed his clearing with a fence, and at his solicitation the appellant constructed cattle-guards in its road-bed at the points where it entered and left the field. These guards were kept up by the railroad company, which had them constructed in such a manner as to protect the land and allow the trains to pass. On one occasion the appellant, when notified, failed to repair the guards immediately, and the appellee stationed a watchman there, whose wages the company paid. A man who owned some porkers lived beside the appellee's close, where a crop of oats was growing, when, in March, 1882, the guards were burned by gypsies. The appellee notified the officers of the railroad before the swine found this entrance, but the company neglected to mend the breach for a time, and the hogs, coming through, destroyed the oats before the gap was closed.

Nugent & McWillie for the appellant.

H. C. Fairman for the appellee.

CAMPBELL, C.J.—No obligation rested on the railroad company to construct cattle gaps for the accommodation of the appellee. It was a mere favor to him that the gaps were made at his request. They were wholly for his advantage, and the favor done him by the company in making them and repairing them from time to time did not impose any obligation on the company to continue this course. The mistake of the appellee in supposing he had a right to have the cattle gaps kept in order by the appellant did not give him such right, and if the appellant thought itself bound to keep them up, its misapprehension did not create the obligation. A repetition of favors for accommodation cannot constitute a foundation for a valid claim to their enjoyment as a right. The course of dealing between the parties about the cattle gaps did not affect the question of right or liability with respect to them. The appellee knew they were constructed at his request as a favor to him, and although they were repaired several times by the company, and once he was reimbursed for the expense of a guard he employed at the gap while waiting its reconstruction, he was well aware of all the facts, and the law imputes to him a knowledge of the non-liability of the company for the maintenance of the cattle gaps, and it is his misfortune to have relied on the appellant to render him a service for which he had no legal claim on it.

The moral equity of appellee's claim may seem strong, but a legal right cannot be founded merely on the hardship of not recognizing it. Unless the appellant was legally bound to repair the gap, it was not liable for not doing it. It certainly was not originally bound to construct these appliances for the benefit of

the appellee. Did the obligation arise subsequently because of the generosity of the original favor? Shall a succession of favors by the mere process of addition sum up a right as their result? Did the appellee acquire a vested right to be further accommodated? The sole claim of the appellee against the appellant is that the cattle gaps should have been kept up by the latter, because they had formerly been. He had been led to rely on a continued enjoyment of the favor, because it had never been denied him. He was disappointed that the appellant did not promptly respond to his request to repair the broken gap, and it may be truly said that the course of the appellant had led him to expect that it would promptly repair it, but as there was no legal obligation on the appellant, its failure imposed no liability. It was an instance of disappointed expectation of a continuance of favors not before denied. The consequence of such disappointment must always be submitted to without complaint, because the sufferer is without any right. Having no right, he is without remedy.

Reversed and remanded.

#### DISSENTING OPINION.

• CHALMERS, J.—Without regard to the question of whether it was originally the duty of the railroad company to erect and maintain the cattle-guard I think it plain, on principles of estoppel, that it was bound in this case to have either rebuilt it or given the appellee seasonable notice that it did not intend to do so. When Dixon cleared and fenced the land, more than thirty years ago, he called upon the railroad authorities to build the cattle-guard, so that cattle might be prevented from getting into his fields. They, at once and without objection, complied with his demand; giving no intimation whatever that he had no legal right to make such demand. They have maintained it continuously from that day to this. It has frequently rotted away or been destroyed in the long lapse of years which has intervened, and as fast as the decay or destruction has been observed by them, or notified to them by Dixon, they have promptly repaired it. Upon one occasion, when they were slow in doing this, Dixon stationed a guard at the gap for the purpose of keeping out the cattle, and the expense of the guard was without objection paid by the railroad company.

If all this had been understood by both parties to be a gratuity conferred by one and received by the other, I admit that no rights or obligations could spring from it, since no man can base any legal expectation of continued favors in the future from any number of gratuitous favors in the past; but there is not the slightest hint in the record that either party has considered these acts as mere gratuities. It is quite certain that Dixon thought that



the railroad company was only doing that which they were compelled by law to do, and he only receiving that which he was entitled to. I think it clearly deducible from the facts that the railroad company coincided in this opinion. They seem to have remained of this opinion until this suit was brought, for they actually repaired the cattle-guard upon notice from Dixon on the occasion which gave rise to this suit. They were slow in so doing, and the loss to Dixon occurred during this delay. They received his demand upon this occasion, as upon all others, without objection, and without the least intimation of dissent; and their defence now upon the ground that they owed no legal duty to Dixon is manifestly an afterthought.

I decline to consider whether the law originally or during all these years required them to keep up the cattle-guard built and maintained by them in the middle of their road-bed and an interference with or repairs of which by Dixon would, I doubt not, have been prevented by them as being dangerous to the safety of their trains. If they had known all the time or had just discovered that no law compelled them to do what they have been doing at Dixon's command for thirty years, they must have known that Dixon did not so regard it; and the plainest principles of fair dealing required that, when the latter called upon them again to repair, they should notify him of their intention not to do so. But, in truth, they then had no such intention; and it was only when they were called upon to make amends for neglect, in promptly doing that which both parties believed to be their duty, that they changed front and repudiated the obligation. I do not think I ever knew a plainer case for the application of that wholesome principle which forbids a man to claim his legal rights when by his conduct he has misled another to his detriment as to what those rights were. It has repeatedly been held that a man who in ignorance of his own title to land has induced another to buy it, is estopped thereafter to claim it. I do not think that the railroad company has estopped itself to claim that no law compels it to maintain cattle-guards; but I do think it clear that they were bound to notify Dixon of their intention not to repair, so that he might have taken steps to protect himself; and that not having done this, they were responsible for the loss sustained. This conclusion seems the more irresistible when we consider the fact known to everybody, that the railroads in this State have always maintained cattle guards on their tracks when traversing cleared lands, and that no prudent railroad company would for one moment entertain the idea of permitting these erections to be tampered with or repaired by the farmers of the country. Such a course might and probably would soon result in the destruction of their trains. While no contract to keep up the cattle-guard by the railroad

company has been proved, it may, I think, be safely presumed from the long and uniform conduct of the parties.

**Injuries to Crops.**—As to injuries to crops caused by defects in a statutory fence and the liability of the railroad company therefor, see *Chicago, R. I. & P. R. Co. v. Clare*, and note, *infra*.

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CHICAGO, ROCK ISLAND AND PACIFIC RY. CO.

v.

CLARE.

(79 *Missouri Reports*, 39.)

A complaint in an action under the 48d section of the Missouri Railroad Law, to recover double damages for injury to crops, alleged that "at a point on defendant's railroad where defendant had failed to erect and maintain lawful fences on the sides of its road as required by said 48d section, where the same passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, and by reason of said failure," certain hogs broke into and destroyed plaintiff's corn. *Held*, (1) That this complaint negatived the possibility of the hogs having entered at the crossing of a public highway; (2) that in actions for damages to crops there is no necessity for negating this possibility.

APPEAL from Platte Circuit Court.

Shanklin, Low & McDongal for appellant.

R. P. C. Wilson for respondent.

**MARTIN, C.**—This is a suit for damages to crops by the entry of stock, and was commenced on the 9th day of August, 1879, before a justice of the peace of Green Township, Platte County. The statement is as follows:

Plaintiff states that defendant is a corporation; that about the 1st day of September, 1878, in Green Township, Platte County, Missouri, at a point on defendant's railroad, where the said defendant had failed to erect and maintain lawful fences on the sides of said railroad, as required by the 43d section of chapter 37 of Wagner's Statutes, where the same passed through, along, or adjoining inclosed or cultivated fields or uninclosed lands, etc., and by reason of said failure, aforesaid, certain hogs broke into and laid waste and wholly destroyed about four acres of corn, belonging to plaintiff, of the value of \$30. Wherefore plaintiff asks judgment for double the value of said corn as his damages, with lawful interest, by virtue of the said section 43.

Judgment went for plaintiff before the justice. The defendant appealed the case to the circuit court, where the plaintiff again recovered judgment in the sum of \$60. From this judgment the defendant appeals. At the close of the trial in the circuit court

the defendant preserved by bill of exceptions its objection to the sufficiency of the statement, its motion for new trial in arrest of judgment.

The principal ground of objection to the sufficiency of the statement now urged by defendant is that it fails to show that the defendant was required to fence its road at the point where the stock entered upon plaintiff's land. It is urged that the statement does not negative the possibility of the hogs having entered at the crossing of a public highway. I think that inference is sufficiently negatived in the statement. It is alleged that the "hogs broke into" and destroyed four acres of corn, by reason of the failure of the defendant "to erect and maintain lawful fences on the sides of said railroad, as required" by the 43d section of the 37th chapter of the act on railroads, "where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands." It may be remarked here that the necessity of excluding the operation of the exemption to fence highway crossings is not apparent in cases of damage to crops for a failure to fence. Cattle may be killed at railroad crossings without subjecting the company to double damages; because it is not lawful to inclose the road at such crossings with a fence or any other protection. No entry of cattle upon the road by reason of the absence of a fence across the highway can have any bearing upon a case for damages to crops. When the road becomes liable in such a case it must always be for a failure to erect fences on the sides of its road or on the sides of the highway crossings over its right of way.

The point made by counsel for defendant to the effect that no liability for failure to "maintain" a lawful fence is alleged, because no negligence in that respect is averred, is not well taken as an objection to the sufficiency of the petition. It is mere surplusage if no cause of action is alleged in connection with it. If it were stricken out the allegation of the failure of the defendant to "erect" a lawful fence would remain, and the bill of exceptions admits that evidence was given by plaintiff tending to support what is alleged in the statement.

Judgment affirmed. All concur.

**Injuries to Crops Arising from Failure to Fence.**—A railroad company failing to construct a statutory fence is ordinarily held liable for injuries done to crops by cattle straying on lands which should have been fenced. *Smith v. Chicago, etc., R. Co.*, 38, Iowa, 518; *Donald v. St. Louis, etc., R. Co.*, 44 Iowa, 157; *Dean v. Sullivan R. Co.*, 22 N. H. 816; *Holden v. Rutland, etc., R. Co.*, 30 Vt. 298; *Comings v. Hannibal, etc., R. Co.*, 48 Mo. 512; *Trice v. Hannibal, etc., R. Co.*, 49 Mo. 440; *Graw v. St. Louis, etc., R. Co.*, 54 Mo. 240; *St. Louis & San F. R. Co. v. Sharp*, 13 Am. & Eng. R. R. Cas. 595; *St. Louis & S. F. R. Co. v. Ritz*, *supra*; *Pound v. Port Huron & S. W. R. Co.*, *supra*; *Raridon v. Central Iowa R. Co.*, *supra*; *Chicago, R. I. & P. R. Co. v. Clare*, 79 Mo. 39; *s. c.*, *supra*.

But see, *contra*, *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 203; and see *Vicksburg & Meridian R. Co. v. Dixon*, 61 Miss. 119; *s. c.*, *supra*.

## LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO.

v.

CLARK.

(94 *Indiana Reports*, 111.)

In a suit against a railroad company for killing an animal, on account of the want of a sufficient fence, if the company relies upon the fact that its road could not be fenced at the place in question, it has the burden of proof as to that matter.

FROM the Floyd Circuit Court.

D. M. Alspaugh and J. C. Lawler for appellant.

S. B. Voyles and H. Morris for appellee.

ZOLLARS, J.—Appellee recovered a judgment against appellant for the value of a horse killed by one of its trains, in the town of Salem, in Washington County. The venue having been changed, the case was tried in Floyd County.

The complaint is in two paragraphs. The first charges a negligent killing, without fault on the part of the plaintiff. The second is based upon the statute, and charges a failure to fence. The case is presented for review upon the evidence alone.

Appellant's counsel urge, with ability, that the judgment cannot be maintained upon the first paragraph of the complaint, because of contributory negligence on the part of appellee. It will not be necessary for us to decide that question, as we feel constrained to affirm the judgment upon the second paragraph. The company, being liable under this paragraph, is liable without reference to contributory negligence on the part of appellee. *Louisville, etc., Ry. Co. v. Whitesell*, 68 Ind. 297; *Grand Rapids, etc., R. R. Co. v. Jones*, 81 Ind. 523.

The horse approached the railroad upon Mulberry Street. The railroad does not intersect the street at right angles. The street does not extend across the railroad. It seems to be admitted that the south line of the street intersects the railroad so as to form an obtuse angle.

It is contended that north of this intersection there is a triangular piece of land between the railroad and the eastern terminus of the street, that might have been fenced. We do not regard this of much consequence to either party. There is evidence which tends strongly to show that the horse went upon the railroad thirty feet north of where the north line of the street intersects the railroad, or would intersect it if extended to it; and from a strip of

land on the west side of the railroad, between it and an inclosed field. There was neither fence nor cattle-pit to prevent animals from going upon this strip of land. No sufficient excuse is furnished for the absence of them. If, as contended in argument, the company was not required to maintain a fence on the east side of the track, opposite this strip of land, it was absolved from the obligation of fencing it. *Indiana, etc., Ry. Co. v. Leake*, 89 Ind. 596. The strip of land in question extends from Mulberry Street to a culvert, about one hundred yards north. Opposite this, on the east side of the railroad, there was no fence. It appears that appellee, in reaching his farm, has been accustomed to pass along the east side of the railroad track to a gate near the culvert. Whether he passes over the company's right of way, or if so, by what authority, does not appear. For aught that appears, the company might have built and maintained a fence on the east side of its track. Such being the case, it was bound to do so, and hence was also bound to maintain a fence on the west, with proper cattle-pits, to prevent the ingress of animals to the strip of land. The burden was upon the company to show that it was not required to maintain these fences. This it has failed to do. *Fort Wayne, etc., R. R. Co. v. Mussetter*, 48 Ind. 286; *Jeffersonville, etc., R. R. Co. v. Brevoort*, 30 Ind. 324; *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426.

If it appeared that the east side was left open for the accommodation of appellee, possibly a different result might have been reached.

Upon the question of the value of the horse the evidence is conflicting; we cannot say that the amount allowed by the court is too large.

The judgment is affirmed, with costs.

**Burden of Proof is on Company to show no Obligation to Fence.**—Where a railroad company in an action for killing cattle defends upon the ground that it was not bound to fence its road at the point where the animals came on the track, the burden of proof is upon it to show that such is the case. *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 95; *Indianapolis, etc., R. Co. v. Penry*, 48 Ind. 128; *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *Toledo, etc., R. Co. v. Pence*, 68 Ill. 525; *Ewing v. Chicago, etc., R. Co.*, 72 Ill. 25; *Comstock v. Des Moines, etc., R. Co.*, 32 Iowa, 376; *Jeffersonville, etc., R. R. Co. v. Lyon*, 2 Am. & Eng. R. R. Cas. 648; *Union Pacific R. Co. v. Dyche*, 28 Kans. 200; s. c., 11 Am. & Eng. R. R. Cas. 427; *Indianapolis, Peru & C. R. Co. v. Lindley*, 75 Ind. 426; s. c., 11 Am. & Eng. R. R. Cas. 495; *Cincinnati, etc., R. Co. v. Ford*, 89 Ind. 92; s. c., 13 Am. & Eng. R. R. Cas. 571; *Terre Haute & Ind. R. Co. v. Penn*, 90 Ind. 284; s. c., 15 Am. & Eng. R. R. Cas. 561.

SCHLENGENER

v.

CHICAGO, MILWAUKEE AND ST. PAUL RY. Co.

(61 *Iowa Reports*, 235.)

The service upon a "station agent" of a railroad company of the notice required by section 1289 of the Code of Iowa as a foundation for the recovery of double damages, is sufficient, without a more specific showing that such agent was "employed in the management of the business of the corporation."

Where the defendant introduced no evidence, and there was no conflict in that introduced by plaintiff, the omission of the court to instruct the jury that the burden of proof was on the plaintiff could have wrought no prejudice to defendant, and was not reversible error.

Where it appeared from the evidence that the cattle were killed on plaintiff's farm, at a place where there was no highway or public crossing, this was sufficient to warrant the jury in finding that the accident occurred at a place where defendant had the right to fence.

APPEAL from Cerro Gordo District Court.

Action to recover double damages for stock killed by a train on defendant's road, at a place where the defendant had the right, but failed, to fence its road. Trial by jury, verdict and judgment for the plaintiff. Defendant appeals.

Geo. E. Clark for appellant.

H. H. Bush for appellee.

SEEVERS, J.—When stock is killed or injured by reason of the operation of a railroad at a place where the company has the right, but has failed, to fence its road, double damages may, under the statute, be recovered. But to entitle the plaintiff thereto, he must serve a notice in writing, accompanied with an affidavit showing the injury or destruction complained of, "on any officer, station or ticket agent, employed in the management of the business of the corporation in the county where the injury complained of was committed." Code § 1289.

To the notice was attached the affidavit of H. H. Bush, in which it was stated he had served the notice on "H. E. Barber, station agent of the defendant, at Garner, Iowa;" and Mr. Bush testified as a witness that he had served the notice on "H. E. Barber, the agent of the defendant, at Garner."

The foregoing evidence was objected to on the ground that the same was immaterial and incompetent. The objection was overruled, and this ruling of the court is assigned as error. The point now made is that under the evidence the plaintiff was not entitled to recover double damages, because it was not shown that the person on whom the notice was served was "employed in the man-



agement of the business of the corporation." In *Welch v. C., B. & Q. Ry. Co.*, 53 Iowa, 632, the notice was served on "J. B. Sullivan, at the station at Clarinda, in said county, said Sullivan being the station agent of said road at said place;" and it was held that the service was sufficient. Following that case, we must hold the service of the notice in this case to be sufficient.

It is assigned as error that the court failed to say to the jury that the burden of proof was on the plaintiff, and that before he could recover he must establish the necessary facts by a fair preponderance of the evidence. The charge of the court fairly and fully sets forth the facts which must be found by the jury before the plaintiff could recover. There was no conflict in the evidence, and we infer that the defendant did not introduce any evidence. The only question before the jury, therefore, was as to the sufficiency of the evidence introduced by the plaintiff. Under such circumstances, the defendant could not have been prejudiced by the failure of the court to say to the jury that the burden was on the plaintiff, and that he must establish his right to recover by a preponderance of the evidence. We doubt whether this point was made in the court below until after the verdict. If so, it came too late. The record fails to show that the attention of the court was called to the omission before the jury retired to consider as to their verdict.

It is said, there was no evidence tending to show that the right to fence existed at the place where the stock was killed. But we think there was. The plaintiff testified that the cattle killed were "feeding on my place," and that "there was no highway or public crossing where they were killed." Another witness testified: "I saw the engine strike the two heifers. There was no public highway or crossing at the place." The sufficiency of this evidence was for the jury. By the term "place" the plaintiff meant farm, and the jury, no doubt, so understood him. The defendant had the right to fence its road through the plaintiff's farm, unless at a place where it was crossed by a highway. We think the evidence was sufficient to warrant the verdict. The appellee asks that he be allowed damages under the statute, on the ground that the appeal was not taken in good faith, but for the purpose of delay. But we are not prepared to say that this so clearly appears as to justify us in awarding damages.

Affirmed.

**Service of Process.**—In actions against railroad companies for injuries to cattle occasioned by a failure to fence the road as required by statute, service upon a station agent is good. *Hudson v. St. Louis, etc., R. Co.*, 53 Mo. 525; *Toledo, N. & W. R. Co. v. Owen*, 43 Ind. 405.

Service upon a conductor will also be a good service. *New Albany, etc., R. Co. v. McNamara*, 11 Ind. 543; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3; *New Albany, etc., R. Co. v. Powell*, 13 Ind. 373; *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *Louisville, etc., R. Co. v. Cauble*, 46 Ind. 277.

HAYT

v.

DETROIT, G. H. AND M. RY. CO.

*(Advance Case, Michigan. November 19, 1884.)*

As the statute of Michigan does not preclude railroad companies from putting gates or bars at places other than farm crossings, they may construct them at other points when deemed advisable, and a fence with such gates or bars may be a sufficient fence within the requirements of the statute.

Error to Clinton.

A. D. Driswold for plaintiff.

Anthony Cook, George Jerome, and Wm. H. Russell for defendant and appellant.

COOLEY, C.J.—Plaintiff sued the defendant to recover damages for the killing of certain colts owned by him, by running upon them one of its trains. The breach of duty charged upon the defendant was that while operating its railroad it “did not maintain a fence of the height and strength required by law, or sufficient to prevent cattle or other animals from getting on its said railroad on the south side thereof, in the township of Ovid, aforesaid, at a place other than at a street or farm crossing, or at or about station ground, but, on the contrary thereof, the said defendant, at the time and place aforesaid, negligently and unlawfully permitted the said railroad and the track thereto, along which the said defendant ran several railroad steam-engines and passenger and freight trains, by night and by day, to be and remain unfenced and open to free and unobstructed ingress by horses and cattle from adjoining lands,” whereby the said colts “strayed and went upon the grounds and track of the defendant’s said railroad, at the time and place aforesaid, and were then and there run upon and against,” etc.

On the trial it appeared that the colts went upon the track of the railroad in the night-time, passing to reach it through the premises of one Van Deusen, and through a gate immediately back of Van Deusen’s house. The gate was not at a farm crossing, and would seem from the evidence to have been much used by people in the neighborhood. Van Deusen, for the protection of his own stock, was accustomed when at home to look every night to make sure that the gate was closed, and he had done so and found it closed the evening of the night the colts were killed. How the gate came to be open afterwards was not shown. The plaintiff contended on the trial that the defendant should not have allowed the gate to be constructed for use where this was constructed, and

that the fence, with this gate in it, could not be deemed the sufficient fence the statute requires. In submitting the case to the jury the judge said: "The question comes, had the defendant complied with the law,—made such a fence along the south side of its track as the law required when they permitted the gate to be kept there? Assuming now that it was a good gate and of sufficient strength, equal to the strength of the fence when properly shut, did they comply with the law when they permitted the gate to be put in there and kept there, knowing its liability to be sometimes open and sometimes shut; was that meeting the requirements of the law? If it did meet the requirements of the law, then, of course, there is no negligence at that point, and no liability because of putting in the gate. I leave the question to you, gentlemen of the jury, to say from the evidence in the case what is in the case as to the gate being there, and its having been sometimes open and sometimes shut by the employees of the company. I leave that for you to say, with the gate there, and being liable to be sometimes open and sometimes shut, and assuming that it was of proper strength when shut, whether in that condition there would be a fence there as required by law, equal in strength to a division fence as required by the statute. If it was, with the gate there in that condition, its liability to be open and shut, as you have heard it spoken about in the evidence, then the company had done its duty; if not, then it has not."

The jury returned a verdict for the plaintiff. They also found specially in answer to questions that Van Deusen closed the gate between 8 and 9 o'clock in the evening before the injury; that it was afterwards opened by some person or by some other means; that the colts passed through the gateway by reason of its being so opened; and "that the gate in the condition testified to by the witnesses, either shut or opened, was not a sufficient fence within the meaning of the statute." Judgment was rendered on the verdict, and the defendant brings error.

The instruction of the judge took an erroneous view of the statute. The requirement of the statute then in force was that every railroad company should "erect and maintain fences on the sides of their respective roads of the height and strength of a division fence required by law, with fences and cattle-guards at all highway and street crossings, sufficient to prevent cattle or other animals from getting on such railroad; also gates or bars convenient for farm crossings." Pub. Acts 1875, p. 139. It seems to have been thought by the judge that the railroad company should put gates in or allow them to be put only at farm crossings, and that if they were put in elsewhere, and were more liable to be left open than a fence was to be thrown down or get out of repair, the fence, with the gate in, could not be deemed a sufficient fence. And this, obviously, was the view of the jury.

The statute, it will be noticed, is imposing duties on the railroad company when it requires it to erect gates or bars at farm crossings. It does not preclude gates or bars at other places, and there must be many places where they will be needed quite as much, and where the company might be justly subject to complaint if it should refuse to adjoining proprietors the convenience which gate or bars would furnish. We have no doubt whatever of its right to permit them to be constructed, or to construct them itself if it shall deem the construction advisable. Whether the fence elsewhere was sufficient is of no importance in this case, it appearing that the colts actually passed through the gate. *Lawrence v. Milwaukee, etc., R. Co.*, 42 Wis. 322. And the last special finding of the jury being based on the erroneous instruction of the judge, and in itself immaterial, would not preclude the right of the defendant to a judgment, which, on the other findings, ought to have been given in its favor.

A new trial must be ordered.

**Obligation to keep Gates and Bars in Repair.**—When a railroad company constructs a statutory fence which is partly composed of gates and bars it is bound to keep such gates and bars in repair. *Illinois Central R. Co. v. Arnold*, 47 Ill. 173; *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Estes v. Atlantic & St. Louis R. Co.*, 63 Me. 308; *Mackie v. Central R. Co. of Iowa*, 54 Iowa, 540; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168; *Johnson v. Chicago, R. I. & P. R. Co.*, 55 Iowa 707; *McKenly v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 641.

**Gates left open by Passengers or Employees.**—When such gates are left open by the servants of the company, or by passengers travelling upon its road, and cattle stray upon the track and are killed or injured the company is not liable. *Chapman v. New York Central R. Co.*, 38 N. Y. 369; *Spinner v. New York C. & H. R. R. Co.*, 76 N. Y. 153; *Savage v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. R. Cas. 566.

**Gates left open by Land-owner.**—But when such an occurrence is owing to the fault of the owner or occupier of the land, the company is not liable. *Koutz v. Toledo, W. & W. R. Co.*, 54 Ind. 515; *Eames v. Boston & W. R. Co.*, 14 Allen, 151; *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422; *Hook v. Worcester & N. R. Co.*, 58 N. H. 251; *Illinois Central R. Co. v. McKee*, 43 Ill. 119; *Illinois Central R. Co. v. Arnold*, 47 Ill. 173; *Russell v. Hanley*, 20 Iowa, 219; *Henderson v. Chicago, R. I. & P. R. Co.*, 39 Iowa, 220; s. c., 48 Iowa, 216; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168. But see *Laude v. Chicago & N. W. R. Co.*, 33 Wisc. 640.

**Gates left open by Third Parties.**—When gates or bars are opened by third persons not connected with the railroad company or with the land, the company is only liable in case it fails to use due diligence to discover that they are open and to close them. *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa, 188; *Russell v. Hanley*, 20 Iowa, 219; *Illinois Central R. Co. v. McKee*, 43 Ill. 119; *Illinois Central R. Co. v. Arnold*, 47 Ill. 153; *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *Chicago, B. & Q. R. Co. v. Magee*, 60 Ill. 529; *Perry v. Dubuque, S. W. R. Co.*, 36 Iowa, 102; *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 424; *Cleveland, etc., R. Co. v. Swift*, 42 Ind. 119; *Harrington v. Chicago, etc., R. Co.*, 2 Am. & Eng. R. R. Cas. 651; *Atchison, T. & S. F. R. Co. v. Davis*, 15 Am. & Eng. R. R. Cas. 521.

## MISSOURI PACIFIC RY. Co.

v.

MORROW.

*(Advance Case, Kansas. June 18, 1884.)*

A trial court can seldom err in admitting evidence where no reason of any kind is given for its exclusion; and *held*, that the court below did not err in the present case in this respect.

It is always the duty of a railway company operating a railroad to see that proper cattle-guards exist wherever its railroad enters or leaves improved or fenced land, whether such railway company owns the railroad or is simply operating it under a lease.

Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field.

ERROR from Coffey County.

W. A. Johnson for plaintiff in error.

Fearl & Frazier for defendant in error.

VALENTINE, J.—This was an action commenced originally by Thomas Morrow against the Missouri Pacific Ry. Co. before a justice of the peace of Coffey County, Kansas, to recover damages alleged to have been caused by the failure and refusal of the railway company to construct proper cattle-guards on such railway where the same entered and left a certain field in the possession of and occupied by the plaintiff, whereby cattle entered his field, injured his crops, and caused him to expend time and labor in protecting his crops. After trial and judgment in the justice's court, the case was appealed to the district court, where the case was again tried, before the court and a jury.

It appears from the evidence that the railway was constructed in 1870, by the Missouri, Kansas & Texas Ry. Co., and that afterward, to wit: in 1881 and since, it has been operated by the Missouri Pacific Ry. Co. The record does not show by what right or authority the Missouri Pacific Ry. Co. operates the road, but counsel for the Missouri Pacific Ry. Co., in his oral argument in this court, stated that it was by a lease from the Missouri, Kansas & Texas Ry. Co. At the time the railway was constructed, the land which now composes the field in question was unoccupied, unimproved and unfenced prairie land, and it remained in that condition up to 1881, when a portion of the land was ploughed, and, in March and April, 1882, the land was fenced and crops were planted on that portion of the land which had previously been ploughed. The railway was constructed through this land, leaving a portion of the land on each side of the road, but the ploughed land was all on one

side of the road. The land at all times belonged to L. De Witt, but it was hired by the plaintiff, Thomas Morrow, who had the full possession and control thereof. The fence was built on each side of the railway up to and on the company's right of way, but no fence was built across the road, and a space was left on each side of the railway track from fifteen to twenty feet wide, from the fence to the railway track. The damages claimed were for injuries alleged to have been done to the plaintiff's crops by cattle passing along the defendant's right of way, into the plaintiff's field, and onto the plaintiff's crops, and also for the plaintiff's time and labor in keeping cattle away from his field by watching the field and in building an additional fence. A verdict and judgment were rendered in favor of the plaintiff and against the defendant for \$150 damages, and the defendant, as plaintiff in error, now brings the case to this court.

Several errors are alleged in this court, some of which it is not necessary to notice. The first error alleged is the admission of improper evidence, over the objections of the railway company. This question, or rather these questions, arose as follows: various questions were put by the plaintiff to his witnesses to which the defendant objected, but the court overruled the objections and permitted the witnesses to testify. The record shows the objection to each of the questions, the ruling of the court thereon, and the exceptions taken to such ruling as follows:

“To which question the defendant objected; objection overruled, and excepted to by defendant, and witness testified:”

“This question was objected to by defendant; objection overruled, and ruling excepted to by defendant, and the witness answered:”

“Objected to for same reason as last question, and same ruling and same exception, and witness answered as follows:”

These are fair specimens of all the other objections, rulings and exceptions made or taken with regard to the evidence. Now, it is not obvious from the questions put to the witnesses that the evidence to be elicited thereby would have been incompetent or improper; and we cannot even say that the evidence actually given by the witnesses in answer to these questions was incompetent or improper. But even if it was, we cannot say that the court below erred in admitting it, for a trial court can seldom err in admitting evidence where no reason of any kind is given for its exclusion; and in the present case no reason was given why the evidence should be excluded. The main point, however, made by the defendant in this case is that a railway company not owning the railway but simply operating it under a lease, is not bound under the statutes to construct cattle-guards on such railway, and as authority therefor, the defendant quotes section 37, Art. 2, Ch. 84, of the compiled laws of 1879, which reads as follows: “When any rail-



road runs through any improved or fenced land, said railroad company shall make proper cattle-guards on such railroad when they enter and when they leave such improved or fenced land." The defendant, plaintiff in error, also cites the case of the St. L., W. & W. Ry. Co. v. Curl, 28 Kas. 622, as authority for this position. Now, it is generally true, as decided in that case, that when a railway company constructs a railway, it is bound to construct proper cattle-guards; but this principle of law does not apply to the present case; for during all the time that the Missouri, Kansas & Texas Ry. Co., the constructor of this railway, operated the same, the land which now constitutes the plaintiff's field was neither improved nor fenced. But whatever may be the duty of a railway company constructing a railway, we think it is always the duty of a railway company operating the same to see that proper cattle-guards exist wherever its railway enters or leaves improved or fenced land; and, taking this view of the case, it was the duty of the defendant to see that proper cattle-guards were in existence where its railway entered and left the plaintiff's field.

The next point that the plaintiff in error, defendant below, makes is that the plaintiff below fenced his land only up to the right of way of the railway company, and did not fence the land up to the railway track, and therefore, that there was a space between the railway track and the fence where the cattle could enter, and therefore, that the plaintiff cannot recover. This point, however, has already been decided by this court adversely to the position of the plaintiff in error. *Mo. Pac. Ry. Co. v. Manson*, 31 Kas. 395. Proper cattle-guards are such as will prevent cattle from passing along the right of way of the railway company into an improved or fenced field.

All questions of fact with reference to damages were left to the jury, and properly left to the jury. It was left to the jury for them to determine whether the defendant delayed constructing proper cattle-guards for an unnecessary and an unreasonable length of time; and it was also left to the jury for them to determine what the amount of the plaintiff's damages should be, giving him reasonable compensation for his loss and he using reasonable means for the protection of his crops.

The judgment of the court below will be affirmed.

All the justices concurring.

**Lessee of Railroad Bound to Construct and Maintain Fences.**—The lessee of a railroad is bound to observe the statutory duty to fence, and will be held liable for an injury occasioned by a failure to perform such duty. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa, 282; *Clary v. Midland Iowa R. Co.*, 37 Iowa, 344; *Downing v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 96; *Pittsburgh, C. & St. L. R. Co. v. Bolner*, 57 Ind. 572; *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417; *Pittsburgh, C. & St. L. R. Co. v. Currant*, 61 Ind. 38; *Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183; *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287;

Clement v. Canfield, 28 Vt. 302; Stewart v. Chicago, etc., R. Co., 27 Iowa, 281; Whitney v. Atlantic & St. L. R. Co., 44 Me. 362; Bean v. Atlantic & St. L. R. Co., 63 Me. 293; Fontaine v. Southern Pac. R. Co., 1 Am. & Eng. R. R. Cas. 159; St. Louis, W. & W. R. Co. v. Curl, 11 Am. & Eng. R. R. Cas. 458.

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CINCINNATI, HAMILTON AND DAYTON R. R. Co.

v.

LEVISTON.

(97 *Indiana Reports*, 488.)

A bill of exceptions filed in a court to which the venue is changed will not save an exception taken in the court from which the venue is changed, though the same judge preside in both courts.

In a complaint against a railroad company for killing animals while operating the road of another company, it is not necessary under the statute to allege in what name the road was being operated.

Reference in a transcript, for documents, to a bill of exceptions not in existence until after the ruling concerning the documents, is not sufficient.

FROM the Fayette Circuit Court.

R. D. Marshall and T. D. Evans for appellant.

J. W. Connaway and J. R. Mitchell for appellee.

BLACK, C.—The appellee brought this action before a justice of the peace of Union County against the appellant, to recover the value of certain animals owned by the plaintiff killed by the defendant's trains, the places at which the animals entered upon the railroad track not being securely fenced. Judgment upon default was rendered against the defendant for \$70.

The defendant appealed to the Union Circuit Court, and there entered a special appearance, and moved to quash the summons and return. This motion having been overruled, the defendant demurred to the complaint, and the demurrer was overruled. Upon the defendant's application, the venue was changed to the Fayette Circuit Court, where a trial by jury resulted in a verdict for the plaintiff for the same amount. A motion made by the defendant for a new trial having been overruled, judgment was rendered on the verdict.

The appellant has assigned as errors, and discussed in argument, the overruling of the motion to quash the summons and return, the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

The motion to quash was overruled on the 13th of June, 1882, and the Union Circuit Court then gave sixty days' time "from

day of trial" to file a bill of exceptions. The trial was had on the 16th and 17th of October, 1883, in the Fayette Circuit Court. The motion for a new trial, made the next day, was overruled on the 23d of October, 1883, and the court then gave sixty days from that date in which to file a bill of exceptions. There is in the record but one bill of exceptions, which was presented to the judge and signed on the 13th of December, 1883, and filed on the 17th of the same month. This bill contains the summons and return, and the written motion to quash, and states the ruling and exception thereto.

To present to this court an exception to the overruling of this motion, it was necessary that the grounds of the motion should be shown by proper bill of exceptions. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, and cases there cited. In *Lansing v. Coats*, 18 Ind. 166, it was said that the time fixed by the court for the filing of the bill of exceptions should be definite and reasonable.

The manner of giving time adopted by the Union Circuit Court in the case at bar would sometimes lead to great uncertainty and vexation, and it is certainly not commendable. Whether it may be permitted we need not here decide, for the exception to the decision of the Union Circuit Court could not be preserved by a bill filed in the Fayette Circuit Court, though the same judge presided in both courts. *McMahan v. Spinning*, 51 Ind. 187. The ruling upon the motion to quash is, therefore, not before us.

The complaint was in three paragraphs. In the title the parties were named as follows: "William R. Leviston v. The Cincinnati, Hamilton & Dayton R. R. Co., operating the Dayton, Michigan, Cincinnati, Richmond & Chicago, and Cincinnati, Hamilton & Indianapolis railroads."

The first paragraph was as follows: "William R. Leviston, plaintiff, complains of the Cincinnati, Hamilton & Dayton R. R., operating the Dayton & Michigan R. R., Cincinnati, Richmond & Chicago R. R., and Cincinnati, Hamilton & Indianapolis R. R., defendant, and for cause of complaint says that the defendant, on the 20th day of June, 1881, and ever since, and now is operating, running and controlling the Cincinnati, Hamilton & Indianapolis R. R., and that while said defendant, by her agents and employees and servants, was engaged in running, controlling and operating that portion of the defendant's road through the county of Union, in the State of Indiana, to wit, on the 20th day of June, 1881, within said county of Union and State of Indiana, run one of her locomotives and train of cars attached thereto, against and over one sow hog, then and there and thereby killing and destroying said hog, then the property of the plaintiff, in the sum of twelve dollars; and that the said damage and killing of said animal did not result from the negligence and carelessness of the plaintiff; and that at the time and at the place when and where said animal entered upon

the grounds and railroad track so run, controlled, and operated by the defendant as aforesaid, was not securely fenced, and said fence maintained as and by the statute law of the State of Indiana in such case made and provided. Wherefore," etc.

The second paragraph charged the killing of the plaintiff's heifer, of the value of \$40, on the 8th of September, 1881. The third paragraph charged the killing of his two hogs, each of the value of \$9, on the 11th of February, 1882. The second paragraph named the defendant as "The Cincinnati, Hamilton & Dayton R. R. Co., operating," etc. Otherwise the second and third paragraphs were like the first.

While in each paragraph the place at which the killing was alleged to have been done was spoken of as being on a portion of the defendant's road, yet each paragraph, taken as a whole, must be construed, we think, as charging that the killing therein alleged was done on the Cincinnati, Hamilton & Indianapolis R. R., which at the time was being operated, run and controlled by the defendant.

It is contended on behalf of the appellant, that, to make the complaint state a cause of action against the appellant, it was necessary to allege in what name the appellant was operating, running and controlling the Cincinnati, Hamilton & Indianapolis R. R.

Prior to March 4th, 1863, there was no liability, and no action would lie, for the killing or injuring of animals by the locomotives, etc., run on a railroad, on the ground that the railroad was not securely fenced, except against the railroad company owning the road; so that if that company were insolvent and in the hands of a receiver, assignee, lessee or other person or corporation operating the road, a judgment for the killing of animals, such as could be obtained on the ground that the road was not fenced, could not be collected. *Indianapolis, etc., R. R. Co. v. Solomon*, 23 Ind. 534.

At the date mentioned, a statute was enacted (1 R. S. 1876, p. 751), the first section of which provided as follows: "That lessees, assignees, receivers, and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act."

The second section provides: "That whenever any animal or animals shall be or shall have been killed or injured by the locomotives, cars, or other carriages used on any railroad in, or running into or through this State, whether the same may be or may have been run and controlled by the company, or by the lessee, assignee, receiver, or other person, the owner thereof may go before some justice of the peace of the county in which such killing or injuring occurred, and file his complaint in writing, and such justice

shall fix a day to hear said complaint, and shall cause at least ten days' notice to be served on the railroad company, by the service of a summons by copy on any conductor of any train passing into or through said county." Provision is made in this section for the bringing of the action in the court of common pleas, or the circuit court, or before a justice, if the injury amounted to more than fifty dollars.

The next section provides, that if the complaint be filed in the court of common pleas, or in the circuit court, the summons shall be served by the sheriff "on the railroad company defendant," and that the "summons may be served by copy on any conductor on any train on said road passing into or through said county."

The fourth section is as follows: "The action may, in all cases contemplated by this act, be brought against the railroad as defendants, whether the same is or was being run by the company or by a lessee, assignee, receiver, or other person in the name of such company."

The fifth section, after providing for the giving of judgment for the plaintiff without reference to the question whether the killing or injury was the result of wilful misconduct or negligence, or the result of unavoidable accident, proceeds to provide that if the case be one commenced in the common pleas or circuit court, the court shall, on motion of the plaintiff, on the rendition of judgment, or afterwards, at any time when notice of the motion has been served on the railroad company defendant, as there directed, order a writ to issue, directed to the sheriff, for any agent, conductor, employee of such railroad company, or of the lessees, receivers, or assignees of such company, named in the motion, to appear and answer under oath as to the amount of money in their hands, if any, belonging to such company, or to such assignees, lessees, or receivers, and as to the probable amount of money received by such agents, conductors, or employees belonging to such railroad company, lessees, assignees, or receivers; and provision is made for the making of an order by the court for the payment of such money into the clerk's office of the court.

The next section provides that any person obtaining judgment before a justice for animals so killed or injured, may file a transcript in the clerk's office, and may, upon notice and motion, have the order and proceeding provided for in the fifth section.

The seventh section provides that the act "shall not apply to any railroad securely fenced in, and such fence properly maintained by such company, lessee, assignee, receiver, or other person running the same."

The eighth section provides that any agent, conductor, or employee who shall refuse or neglect to perform or obey the order of the court as specified in the act, shall be deemed guilty of contempt, and fined, to which imprisonment may be added.

This statute of 1863 is still in force, except its first section, which has been amended. Before considering the amendment we will examine the statute as it was before the amendment.

It will be observed that the statute contemplated liability of the company owning the road, and also of any lessee, assignee, receiver, or other person running the road in the corporate name of such company. To enforce the liability of any of these, that is, "in all cases contemplated by this act," the action might be brought against the "railroad as defendants," this whether the railroad "is or was being run by the company or by a lessee, assignee, receiver, or other person in the name of such company." It was only necessary to name as defendant the railroad company owning the road. Under the judgment obtained against such defendant, that company, and also any lessee, assignee, receiver, or other person running the road in the corporate name of the company, would be liable; and a mode was provided of enforcing that liability by an order obtained on notice served on the railroad company defendant.

The whole proceeding for relief, including the manner of serving the summons and the mode of enforcing satisfaction of the judgment, was provided for by the statute.

The owner of the animal killed or injured was not required to learn before suing whether the railroad was run by the railroad company owning the road or by a lessee or other person. He needed only to bring his action against that company; but he could not under the statute render liable any lessee, etc., except one running the road in the corporate name of that company. It was not necessary for the plaintiff, in his complaint against the railroad company owning the railroad, to allege that it was running the road in its corporate name, or how, or by whom, or in what name it was run, in order to render liable to the judgment obtained any lessee, etc., running the road in the corporate name of such company. See *Pittsburgh, etc., Ry. Co. v. Hunt*, 71 Ind. 229. A suit would not lie, under the statute, against a railroad company not owning the railroad, and not running it in the corporate name of the company that owned it, but running it in its own name. *Pittsburgh, etc., Ry. Co. v. Bolner*, 57 Ind. 572; *Cincinnati, etc., R. R. Co. v. Bunnell*, 61 Ind. 183; *Pittsburgh, etc., Ry. Co. v. Currant*, 61 Ind. 38; *Pittsburgh, etc., Ry. Co. v. Hannon*, 60 Ind. 417. And when a complaint did not allege that a defendant shown by the complaint not to be the owner of the railroad was running or controlling it in the corporate name of the company owning it, such complaint was held to be insufficient as against such a defendant. *Cincinnati, etc., R. R. Co. v. Paskins*, 36 Ind. 380; *Jeffersonville, etc., R. R. Co. v. Downey*, 61 Ind. 287.

The first section of said act of 1863 was amended by the act of March 14, 1877 (R. S. 1881, section 4025), which provides: "Any railroad corporation, lessee, assignee, receiver, and other person or



corporation running, controlling, or operating any railroad into or through this State, shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or other carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of this act; and the bills of lading usually issued at any railroad station in the county in which such stock was killed or injured shall be *prima facie* evidence as to the character or name in which said railroad was owned, held, controlled, or operated." The statute contemplates the bringing of the action against the railroad company owning the railroad, as defendant, when, and only when, the road is or was being run by that company, or by a lessee, assignee, receiver, or other person in the name of such company. Section 4028, R. S. 1881.

When the name in which the defendant is sued is the name in which the road was run or operated at the time of the killing or injury, any person or corporation running, controlling, or operating the road is liable. The owner of the animal need not be perplexed or misled as to the character in which the person or corporation running the road was doing so, or be in doubt as to the proper party defendant. He may proceed against a defendant by the name in which the road was run, of which the usual bills of lading will be *prima facie* evidence; and under a judgment obtained against the defendant in that name, the plaintiff may enforce the liability of any person or corporation running, controlling, or operating the railroad, "to the extent and according to the provisions of this act."

We think that while the complaint should be examined with a view to the fact that the proceeding is wholly statutory, yet the statute should be construed liberally with reference to the remedial purpose of the amendment of 1877, and with a view to the fact that the statute provides for the bringing of such actions before justices of the peace. We do not think it necessary, in a complaint against a railroad company showing that the defendant was running, controlling, or operating another railroad on which the killing or injury was done, to allege that such road was run or operated in the name of such defendant, or to allege in what name it was run or operated.

Each paragraph of the complaint showed sufficient facts. The only ground stated in the demurrer and insisted upon here, other than want of facts, was want of jurisdiction of the person of the defendant. It is contended that the complaint was subject to demurrer on this ground because, as is claimed, it showed that the animals were killed by the Cincinnati, Hamilton & Indianapolis R. R. Co. We see nothing in this worth discussion. The demurrer was properly overruled.

Counsel for appellant urge that the court erred in permitting

certain witnesses to answer certain questions, but they have not indicated in what part of the record we may find such action of the court.

It was assigned as cause in the motion for a new trial, that the court erred in permitting the plaintiff to read in evidence certain papers which are not set out in the motion, but references have been made by the clerk in parentheses to the places where they may be found in the bill of exceptions, which was not in existence until long after the overruling of the motion. No question concerning these rulings is before us. *Burns v. Thompson*, 91 Ind. 146.

The refusal of the court to give the jury a certain instruction at the request of the defendant, and the giving of a certain instruction by the court of its own motion, were assigned as causes for a new trial. These instructions do not appear in the transcript except in the motion for a new trial. They could not thus be made parts of the record.

That the verdict was not sustained by sufficient evidence, and that the damages assessed were excessive, were the only other grounds for a new trial which have been pressed here by counsel. It cannot be profitable to extend this opinion by stating the evidence. We have examined, and find that the verdict was sustained by the evidence, and that the damages were not excessive.

The judgment should be affirmed.

**PER CURIAM.**—Upon the foregoing opinion the judgment is affirmed at the costs of appellant.

**Parties Operating Railroad Bound to Construct and Maintain Fences.**—Parties operating a railroad under a contract or agreement with the company owning the same are bound to observe the statutory duty to fence, and will be held liable in case injury occurs from their failure to observe such duty. *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632; *Burchfield v. Northern Central R. Co.*, 57 Barb. 589; *Gardner v. Smith*, 7 Mich. 410; *Jones v. Seligman*, 16 Hun (N. Y.), 230; *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353; *Farrell v. Union Trust Co.*, 77 Mo. 475; s. c., 13 Am. & Eng. R. R. Cas. 572; *McCall v. Chamberlain*, 13 Wisc. 641; *Union Trust Co. v. Kendall*, 20 Kans. 515.

POUND

v.

PORT HURON AND SOUTHWESTERN RY. CO.

(*Advance Case, Michigan. June 4, 1884.*)

A railway company's liability for an injury done to crops by cattle that have gone upon the premises in consequence of the company's neglect to fence its right of way, is not changed by the fact that the road was at the time in the hands of a contractor who had nothing to do with the fencing.

Requests to charge are properly refused if the judge, instead of giving the requests, fully and correctly instructs the jury as to the law applicable to the case.

An exception to refusals to charge is too general which states that "the court refused to give any of the foregoing requests, and the counsel for defendant in due time and form excepted to each refusal."

A railroad company is required to fence its right of way so that cattle cannot come upon it. How. Stat. § 3377. *Held*, that where a company had acquired a right of way across a farm and had taken down the fences already on the premises it was liable for injuries done to the crops by cattle which had come upon the right of way before the company has fenced it and had escaped therefrom upon the farm.

ERROR to St. Clair.

Case. Defendant brings error. Affirmed.

Avery Brothers for appellant.

Frank Whipple for appellee.

SHERWOOD, J.—The plaintiff brought an action on the case for an injury done to his grain and crops in 1882 by cattle entering upon his premises by reason of the defendant's failure to fence their right of way as required by statute. The plaintiff had judgment for one hundred dollars, and defendant brings error.

From the record, which is very full, it appears that the injury occurred while defendants were building the road. One J. S. Casement had the contract for grubbing, clearing, and grading the track; and this is supposed by defendant to release it from whatever liability there may be to the plaintiff for the damage done him. This is a mistake: see 2 Thomp. on Neg. 903-908. Casement's contract had nothing to do with building or maintaining fences along the right of way, and in no way affected the defendant's liability any more than the negligent action of any other of the employees of the company.

No exceptions were taken to the rulings in admitting the testimony. Seven requests were made by defendant's counsel for the court to charge, all of which were refused by the circuit judge, who in lieu thereof charged the jury in his own language and upon his own motion.

This course is quite proper and many times preferable, if the law applicable to the case is correctly and fully given. See *Campau v. Dubois*, 39 Mich. 274.

The exception taken by defendant's counsel to the refusal to give his requests in the language stated by him is very general, and is hardly to be taken distributively under the former rulings of this court. The language used is "the court refused to give any of the foregoing requests, and the counsel for defendant in due time and form excepted to each refusal." *Brown v. Moore*, 32 Mich. 254; *Polhemus v. Ann Arbor Savings Bank*, 27 Mich. 244; *Niles v. Rhodes*, 7 Mich. 374.

If, however, we give the defendant the full benefit of all his exceptions to the court's refusal to charge, we do not think his defence can prevail. How. Stat. § 3377 requires every railroad company to fence its right of way in such manner that cattle cannot get thereon. The evidence in this case shows that it was by getting upon the right of way and passing there from into the plaintiff's field that they were enabled to do the damage complained of. The right of way passed over the plaintiff's land. It further appears that the premises where the property of plaintiff was injured was well and securely fenced and sufficiently protected to secure the crops from injury and depredations by stock, until the defendant entered upon the same and took down and away the fences, and thus left the fields exposed to the inroads of cattle, coming upon and across their right of way. In doing this the company incurred the liability claimed by the plaintiff. The company, it is true, had secured the right of way over the plaintiff's land, but not the right to expose the plaintiff's grain and crops to destruction by neighbor's stock, or even by plaintiff's own cattle, and that, it seems, is what was done in this case.

We find nothing in the record to support defendant's first and second requests. They are clearly erroneous. There was nothing upon which to base defendant's third, fourth, sixth, and seventh requests. The charge fully covers all that is contained in any of the requests, necessary to be given to the jury.

We find no error in the charge or in the record, and the judgment must be affirmed.

The other Justices concurred.

**Liability for Torts of Contractor.**—The company owning the roadbed of a railroad is ordinarily responsible for all injuries occurring by reason of a failure to fence as required by statute, irrespective of the question who was actually operating the road at the time the injury occurred. This principle applies where the road is not yet out of the hands of the contractors and the injury is occasioned by a construction train owned and operated by them. *Huey v. Indianapolis, etc., R. Co.*, 45 Ind. 820; *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 367; *Illinois, etc., R. Co. v. Finnigan*, 21 Ill. 646; *Fort Wayne, etc., R. Co. v. Hinebaugh*, 48 Ind. 854; *Gardner v. Smith*, 7 Mich. 410. But see *Griggs v. Houston*, 8 Am. & Eng. R. R. Cas. 359. See also *Clement v.*

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Canfield, 28 Vt. 302; Chicago, etc., R. Co. v. Whipple, 22 Ill. 105; Whitney v. Atlantic, etc., R. Co., 44 Me. 362; Pittsburgh, etc., R. Co. v. Hannon, 60 Ind. 417; Hughes v. Cincinnati & S. R. Co., 15 Am. & Eng. R. R. Cas. 100.

**Injuries to Crops from Defective Fences.**—It has been in some cases held that a railroad company is not liable for injury to crops occasioned by cattle straying though a failure on the part of the company to fence as required by statute. Clark v. Hannibal, etc., R. Co., 36 Mo. 203.

The weight of authority is, however, entirely to the contrary effect. Dean v. Sullivan R. Co., 22 N. H. 316; Holden v. Rutland, etc., R. Co., 30 Vt. 298; Smith v. Chicago, etc., R. Co., 38 Iowa, 518; Donald v. St. Louis, etc., R. Co., 44 Iowa, 157; Comings v. Hannibal, etc., R. Co., 48 Mo. 512; Trice v. Hannibal, etc., R. Co., 49 Mo. 440; Graw v. St. Louis, etc., R. Co., 54 Mo. 240; St. Louis & S. F. R. Co. v. Sharp, 13 Am. & Eng. R. R. Cas. 595; Clare v. Chicago, R. I. & P. R. Co., 79 Mo. 39; s. c., *infra*. See Vicksburgh & Meridian R. Co. v. Dixon, 61 Miss. 119; s. c., *supra*.

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## SILVER

v.

KANSAS CITY, ST. LOUIS AND CHICAGO R. R. Co.

(78 *Missouri Reports*, 528.)

Under section 800, Revised Statutes of Missouri, 1879, the obligation of a railroad company to fence its road is not postponed until the completion of the road and the running of cars thereon for the carriage of freight and passengers for hire. Although one of the objects of the statute be the security of passengers and employees in transit, its primary object is to prevent the killing of stock and their trespasses upon adjoining fields: and when the necessity for such protection to the owners of land and stock begins, then the obligation to fence attaches; and the company will be liable for the damages caused by its failure to fence, after a reasonable time for the erection of fences has elapsed.

The liability of a railroad company for failure to erect fences on the sides of its road under the statute, cannot be defeated by its contract with another person to erect such fences.

APPEAL from Audrain Circuit Court.

Ira Hall for appellant.

Macfarlane & Trimble for respondent.

MARTIN, C.—This was an action against a railroad company for the killing of stock, and for damages to growing crops. The petition was filed on the 4th day of January, 1879, and contains four statements or counts. In the first the plaintiff sues for the killing of seventeen sheep, valued at \$59.50, on the defendant's track, to which they had strayed by reason of defendant's failure to erect fences as required by law, which now appears in section 809 of the statutes of 1879. This is an action under the statute, and double damages are asked. In the second count the plaintiff

sues at common law for negligence in killing the same stock, claiming single damages only. In the third count he sets out an action under the same section of the statute, for damages in the sum of \$50, inflicted on his growing crops by stock, which had entered his fields by reason of the defendant's failure to build fences as required in said section. In this count he asks for double damages. In the fourth count he sues at common law for the same destruction of crops, alleging that defendant, by its servants and agents, had unlawfully thrown down the fences inclosing his fields, whereby cattle and other animals had entered upon and destroyed the crops growing therein.

It will be seen from this statement, that the petition contains two statutory actions for omission of the defendant to build fences, one for sheep killed on the track, the other for destruction of growing crops by cattle, and two common-law actions for the same injuries, one sounding in negligence, and the other in trespass. As the legal sufficiency of these counts has not been urged before us, I will not consider them with reference to that point.

The answer contains a denial of the allegations of the petition. It also contains a special plea or defence, to the effect that defendant had the right and power to construct a railroad through the plaintiff's lands; that it had bought and paid plaintiff for the right of way through them; that it had entered into a contract with the Chicago & Alton R. R. Co., a corporation under the laws of Illinois, by the terms of which the latter corporation was to construct the defendant's road from Mexico to Kansas City; that said last-mentioned company had sub-let to Messrs. J. S. Wolff & Son the construction of a certain part of the road, including the part running through plaintiff's lands; that said J. S. Wolff & Son went upon said lands and constructed the same, doing no more injury than was necessary to conveniently build said road; that if said J. S. Wolff & Son unlawfully threw down or left down the fences inclosing plaintiff's lands, such acts were without the authority of the defendant, and were wholly outside their authority as contractors, and for which defendant ought not to be held responsible.

The case was tried by a jury. The evidence submitted by plaintiff tended to prove that defendant's railroad ran through plaintiff's inclosed and cultivated fields; that in May, 1878, the road was constructed through said fields; that during the construction the fences running across the right of way were torn down; that no fences were built along either side of the road to protect the plaintiff's fields from the incursions of stock; that by reason of the want of such fences cattle, horses, and other stock passed into plaintiff's fields and damaged his crops to the extent of \$45; that defendant's road was completed through plaintiff's fields about the 1st day of June, 1878, and freight cars were run over the road;



that no fences were built alongside of the road until some time in the fall of 1878; that no other protection of the plaintiff's fields was provided by defendant, and that two thirds of the damage complained of was after the completion of the road through plaintiff's land. The plaintiff also gave evidence tending to prove that in the month of August, 1878, seventeen sheep of the value of \$47, belonging to him, strayed from inclosed fields, through which the road passed, by reason of a want of a fence along defendant's road, and were killed by the engines and cars on defendant's road; that trains of open and box cars had been running back and forth on the road since the completion of it over plaintiff's land in June, 1878.

Defendant's evidence tended to show that defendant had acquired the right of way over plaintiff's land; that the construction of the road over it was made by J. S. Wolff & Son, as contractors, who hired and controlled the workmen, and that the engines and cars run upon the road prior to plaintiff's alleged damage were only used in carrying supplies to be used in the construction of the road. Defendant also produced documentary evidence of the contract with the Chicago & Alton R. R. to construct the road, also of the sub-contract of J. S. Wolff & Son to build that portion of it which extended over plaintiff's lands. The contract with the Chicago & Alton R. R. included a perpetual lease of the whole road to it, at a rental equivalent to a designated portion of the profits and earnings of the road.

At the close of the evidence the court refused the instructions asked by plaintiff. They need not be considered for the reason that the law governing the case is sufficiently involved in the instructions given at the instance of defendant. In these instructions the jury were told that their verdict must be for the defendant on the statutory actions in the first and third counts of the petition, unless the killing of the sheep in the first count and the destruction of the crops in the third count, happened after the completion of the road, and after the company had commenced running trains of cars thereon, for the carriage of freight and passengers for hire. In respect to the common-law action for the killing the sheep contained in the second count, the jury were told that they could not find for the plaintiff unless the train of cars was managed or controlled by defendant or its employees, and the defendant was wanting in the exercise of reasonable care in running the train, and in reasonable effort to avoid striking the sheep, and the killing was the result of such want of care or negligence. In respect to the fourth count which related to trespass in throwing down fences, the jury was instructed to find for defendant, if the defendant had placed the construction of its road in charge of the Chicago & Alton R. R. as contractors, and that company had sub-let the construction thereof to J. S. Wolff & Son, and the trespass complained

of had been done by said J. S. Wolff & Son or their employees. Upon the giving of these instructions, the plaintiff took a nonsuit, which the court refused, on motion of plaintiff, to set aside. The case comes by appeal from this action of the court.

There was no evidence coming from either side to support a verdict on the two common-law counts, no evidence of negligence or want of care of running the cars when the sheep were struck; no evidence of a trespass in throwing down fences which let in the cattle; the fences thrown down appearing to have been across the right of way which had passed to defendant. Neither is there any evidence that those fences which defendant had the right to take down were removed in a negligent or imprudent manner, so as to injure the rights of others. The plaintiff could not have been prejudiced by any instructions on these counts, and, therefore, it is unnecessary to review them. They could not have been more prejudicial than one to the effect that the plaintiff on the evidence could not recover on such counts, and an instruction of that import, if asked, ought to have been given.

The only question necessary for us to consider, involves the correctness of the instructions given for defendant, relating to the the statutory actions contained in the first and third counts. As already stated, these instructions denied any right of action on these counts before the road was completed, and before the defendant had commenced to run cars upon it for the carriage of freight and passengers for hire. This right of action need not be considered with reference to the effect of the contract of construction which was entered into with the Chicago & Alton R. R. The effect of that contract was urged only in the instructions on the common-law counts. We have considered the proposition contained in the instructions, and, in our judgment, it cannot be maintained either upon principle or authority. The third section of the Railroad Act, after the amendment of 1877 more perfectly than before, was intended to afford protection to adjoining proprietors in respect to their stock and crops. The railroads were required to fence their tracks for two purposes. One was to prevent stock from straying on the track, the other was to prevent stock from trespassing upon the adjoining fields. Double damages were given to the owner of the stock killed on the track, and double damages given to the owners of the fields suffering from trespass of stock by reason of any failure to fence the road. It is true this statute also tended to secure passengers and employees of the road from accidents on the track, but the primary and moving object of the statute must have been for the benefit and protection of the parties designated in the statute as owners and proprietors of land and stock, to whom alone double damages were given for injuries and trespass thereto.

The fundamental rule which governs courts in the interpretation

of statutes requires them to give such construction as shall, in the most complete manner, effect the known purpose and object of the statute, provided the language is adequate to afford such construction without violating the obvious meaning of its words and terms. In respect to the first count in the petition which relates solely to the killing of stock on the track, it is evident that no obligation rested on the company to erect any fences before it was possible for any stock to be killed by the engines or cars of the road. The owners of the stock could not be injured before the company commenced to operate engines and cars upon its track, and for that reason they needed no protection before that time. But after the company had begun to operate engines and cars on its road for any purpose whatever, the necessity of protection began; and if the purpose of the statute is to be maintained, the obligation to fence the road must also begin at the same time. The instruction of the court to the effect that it did not begin until the company was operating engines and cars on the track in the carriage of freight and passengers for hire, was clearly erroneous. It is the same thing to the owner whether his stock has been killed by a construction train or lightning express filled with passengers. There is nothing in the reason or language of the statute to justify the courts in postponing the statutory obligation of the company to fence the track, until it is receiving an income from the carriage of freight and passengers. In building a long road, its construction trains might be run for years before it commenced to carry freight and passengers for hire.

The learned counsel for defendant has cited the case of *Comings v. H. & Central M. R. R. Co.*, 48 Mo. 512, in support of his construction. This case will be noticed more particularly when we come to consider the third count. It is sufficient here to say, that the case was not for the killing of stock by the agents, engines, or cars of the road. The court, upon the facts of that case, used the following language: "We think the reasonable construction of the statute is that it requires corporations to have their fences built at least as soon as they commence running their roads." The court does not intimate any exemption of the company from the obligation to fence while they are running one part of the road for the purpose of constructing another part.

In regard to the third count, which relates to damages suffered by reason of stock escaping from their inclosures and entering upon adjoining fields, the instruction that the liability of the company under the statute does not begin until the company has commenced to operate its engines and cars in the carriage of freight or passengers for hire, is equally erroneous. The obligation to build fences as a protection against such damages was not contained in the statutes of 1855. They contained only the provision against the killing of stock on the road. It was held, in the construction of this

statute, that railroads were not under any obligation whatever to build fences to protect adjoining fields from incursions of stock. *Clark's Adm'r v. H. & St. Jo R. R. Co.*, 36 Mo. 202. After this decision, the legislature added the provision to that effect, which, after the amendment of 1877, appears as section 809 of our present revision. We are unable to perceive why the duty to build fences for this purpose is not as imperative as for the purpose of preventing collisions with stock on the track. There is a marked distinction in the character, but not in the necessity of the two provisions.

It will be observed that this provision, in question, has not, like the other, any necessary connection with the running of trains. As soon as the railroad removes the fence extending across its right of way, which it has lawful authority to remove in the construction of its road, the fields are thrown open to the incursions of stock. The necessity of a fence at that time is as urgent as we have seen it to be under the other provision when the road begins to operate its trains. The liability to damage and the necessity for the fence is created by the act of the company, and the statute would fall short of its admitted purpose, if it failed to impose the duty to fence as soon as this liability to injury was caused by the company. There is nothing in the language of the statute to indicate that the legislature intended to postpone this duty till the company had commenced to operate trains for any purpose at all. The clause providing that the land-owner may build the fence at the expense of the company if it neglects for three months after completion of the road to build the fence, does not purport to relieve the road from any responsibility for damages in the mean time. On the contrary, it is expressly recited that "until such fences, etc., are made, etc., such corporation shall be liable in double the amount of all damages," resulting from a want of fences.

In the case of *Comings v. H. & Central M. R. R. Co.*, 48 Mo. 512, the learned judge who wrote the opinion, did not assume to lay down any rule by which future cases could be governed. Following the supreme court of Vermont in *Clark v. Vermont R. R. Co.*, 28 Vt. 103, he holds that fences should be up at least as soon as cars commence running. He declines to rule as a matter of law, that they should be built before that time. Neither does he, as a matter of law, exempt the company from building before that time. Adopting the language of the case in Vermont he remarks: "Though we cannot say, as matter of law, that the defendants were bound to erect fences before or while they were constructing their road through any particular land-holder's premises, yet we can say they must exercise their right with a prudent regard to the rights of others; and if lacking in this duty, they are chargeable with negligence and must answer for its consequences."

Of course, as a matter of law, no court would undertake to indi-

cate the exact time at which the statutory liability for double damages would attach in respect to any particular portion of the road. The law does not require impossible or impracticable things under this statute. And the time for the liability to attach must necessarily vary according to the circumstances surrounding each case. When the fence across the highway is taken down at a given point, the materials to fence the adjoining fields may be at hand, or easily accessible, and as the necessity for the fence is apparent, the obligation of the statute ought to attach in its full force after a reasonable time has elapsed for building the fence. Again, there may be cases possibly in which it would be impossible or impracticable for the company to procure and transport material for building fences, before the track was ironed and equipped with rolling stock sufficient to carry the material to the point where it was wanted. In such cases the liability of the statute would not follow so close on the heels of the necessity as in the former case, but ought, as in that case, to attach after the lapse of a reasonable time for doing the thing required by the statute to be done. The obvious and rational rule of law governing both provisions of this statute is, that after the company, in the construction of its track, has given rise to the want of a fence, the liability of the statute for failure to build one will attach after a sufficient and reasonable length of time, according to the circumstances of each case, has elapsed to build one.

Whether, under the circumstances of any particular case, the company could have practically made the fence at the time of the damage, is a question for the jury to decide. There is nothing new in this rule. It has been already adopted in this as well as in other States, and applied to the liability of railroads under the same or similar statutes; which required the companies to maintain roads as well as to build fences. When by reason of a storm or other accident, the fence built by the road is out of repair, the liability of the road for double damages does not attach at the instant of the accident, but only after a reasonable and sufficient time has elapsed for restoring it to its former condition. *Thompson on Neg.*, 524; *Clardy v. St. Louis, I. M. & S. Ry. Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 555.

In the case at bar the evidence of the plaintiff tended to prove that the road was constructed and completed through the plaintiff's lands in the month of May, 1878, at which time his fences were thrown down and his crops subjected to the incursions of stock; and that no fences were built by the company for his protection until some time in the fall of the same year; that his sheep were killed by the trains in August, and that two thirds of the damage to his crops occurred after completion of the road across his land. Whether, under the circumstances of this case, the company could easily have built their fence before the injuries complained of, was



not considered by the court nor submitted to the jury.. The court disposed of the whole matter by ruling that the liability of the company could not attach until it had commenced to operate trains for the carriage of freight and passengers for hire. This doctrine, in my judgment, is against reason, justice, and authority.

As the case should be remanded for another trial, I will add a few words bearing on the effect of the contract of construction which was entered into with the Chicago & Alton R. R. There is nothing special in that contract requiring that company to build the fences as the road was constructed. And if there was it could not relieve the defendant from the duty of building or causing the fences to be built. The statute imposes this duty on the defendant, and the liability for a breach of it cannot be escaped by merely making a contract with another person to perform it—that other person in this case being a foreign corporation. *Shepard v. Buffalo R. R. Co.*, 35 N. Y. 641. It has been held in this State that in respect to those things which a railroad has the lawful right to perform, such as excavation on its right of way, taking down fences therein, etc., the company is exempt from liability for damages resulting from a negligent performance of the same by a contractor of the company or his employees, to whom the work or job has been given over by the company. *Clark's Adm'r v. H. & St. Jo R. R. Co.*, 36 Mo. 202; *Ullman v. H. & St. Jo R. R. Co.*, 67 Mo. 118. But there is a well-settled exception to this rule in respect to the omission of a duty enjoined it by statute as the owner of property. Such duty cannot be escaped by an engagement with another to perform it. *Hole v. Railroad Co.*, 6 Hurl. & N. 488; *McCafferty v. Railroad Co.*, 61 N. Y. 178; *Ryder v. Thomas*, 13 Hun, 296.

Upon the whole the conclusion is that this case should be reversed and remanded for trial in accordance with the principles expressed in this opinion.

**When Road should be Fenced.**—When there is no express statutory provision, it is the duty of a railroad company to keep its road fenced from the time that it is open for use. *Clark v. Vermont, etc., R. Co.*, 28 Vt. 108; *Continental Improvement Co. v. Ives*, 30 Mich. 448; *Comings v. Hannibal, etc., R. Co.*, 48 Mo. 512; *Holden v. Rutland & B. R. Co.*, 30 Vt. 297; *Baltimore, P. & C. R. Co. v. McClellan*, 59 Ind. 240; *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 367.

**Statutory Provisions as to Time of Fencing.**—By statute in some States a railroad company is given a specified time after the completion of its road to fence the same. Actions for injuries occurring in the interim are governed by common-law principles. *McCall v. Chamberlain*, 13 Wisc. 637; *Rockford, etc., R. Co. v. Connell*, 67 Ill. 192; *Gilman, etc., R. Co. v. Spencer*, 76 Ill. 192; *St. Louis, etc., R. Co. v. Kirby*, 10 Am. & Eng. R. R. Cas. 214.

**Actions for Injuries after Lapse of Statutory Period.**—After the lapse of that time the company will be held liable according to the provisions of the statute. *Rockford, R. I. & St. Louis R. Co. v. Heflin*, 65 Ill. 366; *Toledo, P. & W. R. Co. v. Crane*, 68 Ill. 355; *Peoria, P. & J. R. Co. v. Barton*, 80 Ill. 72.



## CONWAY

v.

## CANADA PACIFIC RY. CO.

*(7 Ontario Reports, Queen's Bench Division, 673.)*

Under the Consolidated Canadian Railway Act 1879, ch. 9 (D.), as amended, a railway company are not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.

THE plaintiffs claimed compensation from the defendants for two horses, the female plaintiff's property, which were killed by a construction train of the defendants on their railway in the township of Ferris, on the 22d of June, 1884. The claim was made upon the ground that the plaintiffs were the occupants of the east half of lot 29, in the 14th concession of that township, and that the defendants were bound to fence the line of their road as against her according to the 46 Vic. ch. 24, sec. 9 (D.), and its sub-sections, which repealed and amended 42 Vic. ch. 9, sec. 16 (D.), and its sub-sections, and that the company had not put up such fence.

The question was, whether the female plaintiff was an occupant of the land in question within the meaning of the Act.

The case was tried by Cameron, C.J., without a jury.

It appeared that the defendants, while constructing their road in that locality, put up some shanties for the accommodation of their men, and for their own purposes, and one of these shanties was used as a boarding-house, the one which the plaintiffs claimed. The person who first kept the boarding-house gave it up, and the plaintiffs went into it, and kept the boarding-house about March, 1883, up to about November of that year. The female plaintiff said she went on to the land in June, 1882, and her house, she said, was on the east end of the lot between lots 28 and 29, and they improved a little on the north side, and about an acre on the south side near the railway track, and that they cultivated what they could in 1883, she expecting then it was to be the defendants' land: that they went in there first as tenants of James Worthington, the manager of the construction work for the defendants: that the first three months they paid \$4 a month, and after that \$6 a month rent: that they paid him rent up to September, 1883, and two months later rent was paid to Salisbury, the paymaster of the defendants: that they had since paid no rent to anybody, the rent being deducted by the defendants from her board-bill for boarding

the men: that she afterwards heard from the assessor that Mr. Worthington gave up his claim to the land, and that she paid taxes on it, and she applied in May, 1884, to the Crown-land agent in Mattawa for it: that a part of the house occupied by her was not built by the company, and that she paid the man \$8 for that part, which she used as a kitchen: that she continued in that house, which was on the concession road, till the last of June, 1884, and until after the horses were killed: that she then went into the nouse upon lot 27, where the station was built, and bought an acre of it: that she was not located for it, but for lot 26: that she made the affidavit of 9th September, 1884, for the purpose of applying for the east half of lot 29: that it was a mistake in the affidavit that she was located for lot 27: it should have been for lot 26: that she was living on an acre she had of lot 27: that she was located for 26 in the spring of 1884, and applied for it before her horses were killed.

At the close of the evidence the learned Chief Justice found that the plaintiff entered into possession of a small portion of lot No. 29 in the statement of the plaintiff's claim mentioned, not exceeding two acres, under one James Worthington, who was a contractor for building the railway: that the land in question was part of the ungranted land of the Crown: that the greater part of the land in the neighborhood was in a state of nature: that the plaintiff paid rent to Worthington for the house up to November, 1883, and since that time the plaintiff had made application to the Crown Lands Department to be allowed to purchase the lot, and that the Department had not as yet given any intimation to her as to whether she would be allowed to buy or not.

He also found that one Rangier was in possession of a small part of the lot, that George Quirt was in possession of part of the said lot, and claimed the right to become the purchaser of the same; and that since this action commenced, he and the plaintiff Catharine Conway had agreed to hold, she the east half and Quirt the west half of the lot: that the defendants were not guilty of any negligence other than the omission to fence their railway over the said lot of land. He found the value of the horses killed by the defendants' train to be \$300, for which amount they were entitled to recover, if under the circumstances the plaintiffs or either of them were or was such occupants of the land that the defendants were bound to fence their railway across lot No. 29 in the pleadings mentioned; and he found that the plaintiffs were not such occupants; and that the defendants were not bound to fence their railway across the said lot; and he dismissed the plaintiffs' action, with costs.

The shorthand reporter at the trial noted that his Lordship said at the time of giving judgment that he was by no means free from doubt that he put a proper construction on the clause: that the

first part of the section, 46 Vic., ch. 24, sec. 9, required the railway company to fence where any part of the land was occupied, no matter how small a part, while the latter part of sub-section 2 only gave the right of occupation to the land in respect of which the fencing must be done; and the occupant of an acre was not the occupant of the whole lot, but only of a part of it; and that he thought it better to decide as he did, so that the matter might be settled by a review of his judgment.

Osler, Q. C., and M. J. Gorman moved to set aside the judgment, and enter it for the plaintiff.

H. Cameron, Q. C., and W. R. White, *contra*.

WILSON, C.J.—The perusal of the evidence satisfies me that until November, 1883, the plaintiff had no right of occupation of any part of lot No. 29, but of the house which she rented from Mr. Worthington, and that she claimed nothing more at that time than as tenant to Worthington. She may have used part of the small cleared parts about the house and railway ground, but not as of right, and as she said she would have continued to pay rent after November, 1883, till she owned the land, if she had been asked for it; but she was not asked for it, because the work had gone further east than lot 29, and the men were not boarded upon that lot after that time. They were then boarded on lot 27.

The plaintiff before the horses were killed had been located for lot 26. She continued to live on the east half of 29 till after the horses were killed, that is, till about the last of June, 1884, and then she moved to lot 27, still keeping possession of the east half of 29, by having some of her goods and crops upon that lot.

In May, 1884, she wrote to the Crown-land agent applying for the east half of 29. On the 9th of September, 1884, she made an affidavit, in which Dranley and Halliday joined, that she was head of the family, and had no son, but seven daughters, and that the land she applied to be located for was wholly unoccupied and unimproved.

That affidavit was not correct in several particulars.

1. She was not properly head of the family, for her husband was living.

2. She had a son.

3. The land was not wholly unoccupied, for there were several of the company's men still occupying shanties upon the lot; and at that time she had been located for No. 26, and lived upon No. 27.

It appears she never paid taxes upon the east half of 29 until the 27th of September, 1884, according to the receipt, although the receipt was not given till the 6th of October.

Mr. Gorman, the plaintiff's solicitor, wrote to the plaintiff, and Mr. Dranley received it for her about the end of September, in

which he stated that neither the plaintiff nor Dranley could recover against the company for their horses which had been killed, unless it could be proved they had some title to the lot; and the plaintiff said the letter stated by payment of taxes or something of that kind.

Then it appears that Halliday, the collector, claimed from Quirt \$15, being the sum said to be payable for the whole lot No. 29, who refused to pay that sum; but he paid about two months before the trial, in October, \$11.08, and, as well as I can make out, after the letter came from Mr. Gorman about proving title in Mrs. Conway by the payment of taxes, or something of that kind, Halliday told Quirt to the effect he would let his share of the taxes stand at the \$11.08, and he would get the rest of the \$15 from the plaintiff, and she then paid him \$3.90, making in all \$14.98 for the taxes for 1884.

It is also quite clear that after the receipt of Mr. Gorman's letter, Quirt was sent for on the 6th of October, about nine days before the trial, by the plaintiff, and by those assisting and advising her in this action, to appear before Mr. Shannon, the magistrate; and Quirt went to the place appointed, the plaintiff's house, and the result of what was then done was that Quirt was induced to give up to the plaintiff all claim to the east half of lot 29, the land in question, and to confine his claim to the west half only of the lot.

The whole country there is unfenced and a common, as the plaintiff said.

Now the question is, was the plaintiff an occupant of the east half of lot 29 at the time her horses were killed on the 2d June, 1884? The statute now in force and applicable to this case is the 46 Vic. ch. 24, sec. 9, repealing and amending the 42 Vic. ch. 9, sec. 16, sub-secs. 2 and 3.

It is not necessary to refer to the earlier Act further than to notice that it applied to "the proprietors of lands adjoining the railway," whereas the later Act is more largely expressed. It was passed 25th May, 1883, and it is:

Section 16. "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied.

2. Or, within three months, after such construction hereafter.

3. Or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon.

4. [And in the last case after the company has been so required in writing by the occupant thereof],

5. Fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength of an ordinary division fence.

6. With openings, or gates, or bars, or sliding or hurdle-gates with proper fastenings therein, at farm crossings of the railway.

7. And also cattle-guards at all highway crossings, suitable and sufficient.

8. To prevent cattle and animals from getting on the railway.

9. But this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

Sub-section 2. "If after the expiry of such delay such fences, etc., are not duly made, and until they are so made, and afterwards, if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, etc., have not been made or maintained, as the case may be, in conformity herewith."

In reading these enactments, the parts of section 16 which I have numbered, the parts to be considered in this case are Nos. 1, 5, 6, 7, 8, 9.

The part numbered 1 applies, because the railway was already constructed on this lot at the passing of the Act on the 25th of May, 1883, as the plaintiff said the company commenced running trains past this lot in the fall of 1882, and it is for that reason the parts numbered 2, 3, 4, do not apply.

The effect of the parts so numbered 1, 5, 6, 7, 8, is, that in the case of any railway constructed at the passing of the Act, on any section or lot of land, any part of which land is occupied, the company shall within three months after the passing of the Act, fence over such section or lot on each side of the railway, with openings, etc., at farm crossings of the railway, and with cattle-guards at all the highway crossings sufficient to prevent animals from getting on the railway.

Number 9 does not apply here, because no compensation of any kind has been given by the company, and besides it only applies when compensation is given for the dispensation of gates or bars, and has no relation to fences.

It is important, however, in this case, because it may enable us to some extent to place a better construction on the word occupied in number 1 of section 16, and the term occupant in sub-section 2, than if number 9 were not there. Number 9 then provides that the clause relating to gates or bars "shall not be interpreted to the profit of," that is, shall not apply to or be available for, any proprietor or tenant of any such section or lot, in case the proprietor has accepted compensation for dispensing with gates or bars.

The meaning of the statute is, that no one, not even the proprietor or tenant, can claim to have the railway fenced off as against

him, unless his land is occupied, and he or some one for him is the occupant of it.

The terms proprietor and tenant do, *ex vi termini*, mean a person having at least a defined and vested estate. I do not say the estate should be a strictly legal estate, or what before the Judicature Act would have been a trust estate, as valid in effect as a legal estate.

A person claiming the land as his own against the legal owner, by any act of wrong as by a disseisin, dispossession or the like, might, I think, be considered a proprietor under this Act. That term is used plainly in opposition to the term tenant. There is no difficulty in determining the meaning of proprietor. It is, in my opinion, used to express the full ownership of the land by legal title, or by claim of title. If a person in a contract for sale of land described himself as proprietor, that would be understood to mean that he was the owner of the property. *Rossiter v. Miller*, 5 Ch. D. 648, 3 App. Cas. 1124.

There is more difficulty about the word tenant. It means some lesser estate or interest than the actual ownership, and it means something more than mere occupancy.

A mere occupier of land is by express enactment of the Assessment Act, R. S. O. ch. 180, sec. 6, sub-sec. 2, made liable for taxes when the occupation is not exempted by sub-sec. 1. See also sub-sec. 7. But that is because an occupant by wrong derives as much benefit by the property as one by title, and the municipality cannot be required to investigate the title of every one who is in occupation of land, whether it is by right or by wrong, and it is just that the occupant, although without title, should be subject to the burdens of the municipality in like manner as those who hold by title.

So a person who has bought or agreed to buy Crown Lands, or who is located for land as a free grant, is subject to taxation for such land, although no license of occupation, location ticket certificate of sale or receipt for money paid on a sale, has issued; and although no payment has been made on the land; or although part of the purchase-money is overdue and unpaid; although such person is not in occupation of the land, and although he has not a very secure title, and perhaps no title at all without a license of occupation under the R. S. O. ch. 23, sec. 15; and yet the interest of a person having a claim under the Assessment Act, sec. 126, may be sold under the R. S. O. ch. 23, sec. 18, although no license of occupation has been issued.

I am of opinion that if a license of occupation has issued to the locatee or purchaser of Crown land under ch. 23, sec. 15, such person may properly be considered to be a tenant under 46 Vic. ch. 24, sec. 9, if in actual occupation of the land, because such person may maintain actions against any wrongdoer as effectually as he could do under a patent from the Crown, and he may assign his



interest in the land; and I am also of opinion that a person who has no license of occupation, etc., but who has a claim and right of occupation of his lot under section 126 above referred to, if in occupation of his land, may also be considered to be a tenant of the land under the 46 Vic. ch. 24.

In this case the plaintiff has no license of occupation, or any kind of right or title to the land. She made application for the land, but whether she will be allowed to purchase it or not, if she desire to purchase it, or whether it will or will not be allotted or assigned to her under "The Free Grants and Homesteads Act," R. S. O. ch. 24, if she desire to get it as a free grant, has yet to be determined. It is very probable she may not be located for it, and it is quite certain she ought not to be, for she was before the time her horses were killed, and at the time she made her affidavit to be located for this land, already located for lot No. 26, and her application for this land was in direct violation of section 7 of the Free Grants Act.

I am of opinion, therefore, the plaintiff cannot be considered to be within the terms of the 46 Vic., c. 24, s. 9, under the term occupant in that section, and she certainly neither was nor is a proprietor or tenant of the land.

The defendants had the right under the 42 Vic., ch. 9, sec. 7, sub-sec. 3, with the consent of the Governor-in-Council, "to take and appropriate for the use of their railway and works so much of the wild lands of the Crown lying on the route of the railway as have not been granted or sold, and as may be necessary for such railway." And the R. S. O. ch. 165, sec. 9, sub-sec. 3, is in the like terms, excepting that the consent of the Lieutenant-Governor-in-Council is required. And I think it may be assumed here that such consent has been given to the company. Now the defendants did take and appropriate the part of this lot north and south of their railway before the plaintiff was in possession, and they have shanties on it also, and some of their workmen are in possession of them, and that possession had not, at the time when the horses were killed, been in any way abandoned; and the defendants were quite as much in possession of the land, if not more so, than the plaintiff was.

I am of opinion, also, the plaintiff was not in fact an occupant of the land at all at the time when, etc. She had rented the house she occupied from the contractor of the road, and paid him rent for it; and she never by any act further than by writing a letter in May, 1884, to the Crown Lands Agent, applying to be located for the land, had extended her possession or occupation before the time when, etc., beyond the possession which she had during the time of her paying rent for the house she was put in possession of. And her conduct, aided by Dranley, who thought to strengthen his own claim against the company by strengthening her right, under which

she claims, by the payment of \$3.90, the balance of taxes claimed from but not paid by Quirt, and the affidavit made by the two before the Crown Lands Agent in September, and the agreement got from Quirt, all just a few days before the trial, showed a scheme to make out a title to the land to which she had no kind of right.

I cannot say I regret the conclusion I have come to, for although the plaintiff has sustained a serious loss by the destruction of her horses, it was very much her own fault in turning them loose as she did, when the horses would be almost certain to roam in the small clearing made by the cutting of the railway line, and for the erection of the shanties required for the workmen, and for the defendants' other purposes; and it would be a great and useless expense, to force the company to fence both sides of the railway along the lots which were occupied, while gaps are left all along the unoccupied lots, through which cattle and horses could always escape on to the line, so long as the occupiers had no side fences to keep their animals from wandering on to the adjacent lots, and getting on to the railway through these gaps.

Upon the whole, I am of opinion the motion must be dismissed with costs.

ARMOUR, J., concurred.

O'CONNOR, J., dissented.

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PITTSBURGH, CINCINNATI AND ST. LOUIS RY. CO.

v.

ALLEN.

(40 *Ohio State Reports*, 206.)

The obligation to construct and keep in repair fences to turn stock, resting upon railroad companies under the act of April 18, 1874 (71 Ohio L. 85), is not limited to the protection and benefit of the owners and occupiers of abutting lands.

A railway company having sold a portion of its right of way on its south side, to a second company—which had bought additional right of way from the land-owners on the same side—for the purpose of constructing thereon a parallel railroad, and the maintenance of a fence between the two roads becoming impracticable, a contract was entered into between the two companies, by which the second company agreed to keep up and maintain lawful fences on the south side of the dividing line between the two railroads; and the second company entered into a contract with the owner of an abutting field, whereby he bound himself to erect and maintain a sufficient fence between said field and said parallel road.

*Held*: That the second company and the owner of said field having neglected to keep up a sufficient fence to turn stock, between said field and the railroad, the first company was not relieved from liability for injury by

one of its passing trains to animals whose owner was a stranger to said contracts, and which, without their owner's fault, had strayed from an adjoining pasture into said field, and thence through said insufficient fence upon its track.

**ERROR to the District Court of Greene County.**

Charles Darlington for plaintiff in error.

Gatch & Wilson for defendant in error.

**DICKMAN, J.**—The plaintiff below, John C. Allen, was the owner and occupier of a tract of pasture land adjoining the field of one John Lucas, and separated by it from the railroad of the Pittsburgh, Cincinnati & St. Louis Ry. Co., upon which the Lucas field abutted prior to the sale of a portion of said company's right of way on the south of its track, as hereinafter mentioned. On the evening of November 5th, 1877, a large number of horses and other stock, belonging to Allen, escaped from said pasture, crossed the Little Miami River, and recrossing the same entered the Lucas field, whence, by reason of the fence along the line of the railroad being broken down and out of repair, they strayed upon the railway track where one of them was killed, and others were more or less injured, by the railway company's locomotive and cars. Allen filed his petition in the Court of Common Pleas of Greene County, against the railway company, claiming damages because of the defendant's failure to construct and keep up a sufficient fence as required by statute, and because the defendant through its agents carelessly and negligently operated the train to the injury of the stock. The plaintiff recovered judgment in the common pleas, which was affirmed by the district court, and to reverse the judgment of the district court, the case comes into this court on the petition in error of the railway company.

A fence sufficient to turn stock, had been erected and maintained between the P. C. & St. L. Ry. and the adjoining field of Lucas, until the construction of the Dayton & Southeastern R. R., which runs parallel with and south of the former road—the boundary line between the two railroads being at a point eight feet south of the centre of the P. C. & St. L. Ry. The Dayton & Southeastern R. R. Co., for the purposes of its proposed road, purchased a portion of the right of way of the P. C. & St. L. Ry., along the south side thereof; and before such purchase, also bought, for the same purposes, additional right of way from the adjoining land-owners, lying south of the right of way of the P. C. & St. L. Ry.

By virtue of a contract between the two companies, the Dayton & Southeastern R. R. Co. agreed to "keep up and maintain lawful fences, crossings and cattle-guards, on the south side of the said dividing line" between the two railroads; and the Dayton & Southeastern R. R. Co. entered into a contract with Lucas, by which he bound himself to erect and maintain a fence between the

railroad and his said field. In the construction of the Dayton & Southeastern R. R., the fence erected by the P. C. & St. L. Ry. Co. along the south side of its track, was taken down from its original place, and located on the south side of the Dayton & Southeastern R. R., but was only partly finished on the 5th of November, 1877. It was conceded by the parties, on the trial in the court below, that at the point where the stock of the plaintiff entered upon the railroad grounds, there was no good and sufficient fence, to turn stock, between the railroad and the adjoining field of Lucas.

In our view of this case, it becomes unnecessary to consider the question of negligence in the management of the defendant's train, as we are of the opinion, that by reason of the insufficiency of the fence between said adjoining field and the railroad, the Pittsburgh, Cincinnati & St. Louis Ry. Co. became liable for the injury to the plaintiff's stock.

It is not claimed that the plaintiff's animals were at large with his knowledge or through his fault. The record does not disclose any contributory negligence on his part, in that respect, which would prevent his recovery from the railway company. It is contended however by the plaintiff in error, that the obligation to maintain fences imposed upon railroad companies by the act of April 18, 1874 (71 Ohio L. 85), is limited to the protection and benefit of the owners and occupiers of abutting lands, and does not extend to the public generally. It is said, that as the field of Lucas intervened, the plaintiff in error was not required to fence against Allen's horses or other stock that might escape—though without his fault—from his pasture, into the intervening field, and thence upon its road. The design of the act of April 18, 1874, requiring railroad companies to fence their roads, was not only to protect the property of adjoining land-owners, and prevent cattle or other domestic animals from endangering themselves, but also to guard the lives of passengers that would be put in peril by animals getting upon the track. The safety of the public at large requires, that good and sufficient fences should be kept up along the whole line of the lands of railroads on both sides, and not merely that safe and sufficient crossings should be maintained, with the necessary cattle-guards. The idea that the liability of railroad companies for failure to comply with the statutory requirement to fence, is limited to owners and occupiers of abutting lands, is negatived by the comprehensive provision of the statute, that "every such railroad company or party shall be liable for all damages sustained in person or property, in any manner, by reason of the want or insufficiency of any such fence, crossing or cattle-guard, or any carelessness or neglect of said company, their agent or agents, in constructing or keeping the same in repair."

It was held in *Marietta & Cincinnati R. R. Co. v. Stephenson*

*et al.*, 24 Ohio St. 48, that the obligation to construct and maintain fences upon both sides of railroads imposed by the act of March 25, 1859 (S. & C. 331), was not limited to owners and occupiers of adjoining lands, but extended to the public generally. Such obligation has not been changed by the act of April 18, 1874, nor do we, in comparing the provisions of the two statutes, discover anything in the last statute which restricts such obligation to those who own lands that abut on railroads.

The railway company, among other things, set up as a defence against the plaintiff's claim, the contract it had entered into with the Dayton & Southeastern R. R. Co. in reference to fencing on the south side of the dividing line between the two roads. Our attention has been called to the 4th section of the act of March 25, 1859, which provides, that "nothing contained in this act shall be held to affect in any manner any contract or agreement between any railroad company or other party having the control and management of a railroad, and the proprietors or occupiers of lands adjoining for the construction and maintenance of fences, cattle-guards, and railroad crossings." If under this section the owner of adjoining lands elects, by contract, to assume an obligation to fence of which the law relieves him, he has not, in the absence of gross carelessness on the part of the railroad company, any ground of complaint if his cattle or other animals are killed upon the railroad through his own breach of his contract. *The C., H. & D. R. R. Co. v. Waterson et al.*, 4 Ohio St. 424. But his neighbors, who are strangers to his contract with the railroad company, and whose stock without their knowledge or fault stray upon his grounds and thence upon the track, are certainly not to be prejudiced in their legal rights by his laches or neglect in performing his agreement.

The competency of the railway company to enter into said contract with the Dayton & Southeastern R. R. Co. will not be called in question, but, as its statutory duty was to keep its road properly fenced, it did not discharge that duty by contracting with another to perform it, if the performance itself was insufficient. *Gill v. A. & G. W. Ry. Co.*, 27 Ohio St. 240. By selling a portion of its right of way for the purposes of a parallel road, the railway company rendered necessary a removal of the fence which it had previously built, and it became its duty to see that the Dayton & Southeastern R. R. Co., which it had made an agent in that behalf, kept up the "lawful fences" according to agreement. If the railway company failed to do so, it cannot be said to have discharged its plain statutory duty to fence its road, by procuring others to agree to keep up the proper fences.

We need not here inquire, how far or in what manner, its contract with the Dayton & Southeastern R. R. Co. or the contract between the last-named company and Lucas, affected the

liability of the railway company to either of said contracting parties. The plaintiff in error can claim no benefit from said contracts, as against Allen, the plaintiff below. Not being an assignee of Lucas, not being a party or privy to said contracts, or connected with them in fact or law in any manner, the rights of Allen are not to be prejudiced by their provisions. In view of the foregoing considerations, and upon a careful examination of the record in this case, we discover no error assigned for which the judgment of the district court should be reversed.

The judgment of the district court must therefore be affirmed.  
Judgment accordingly.

**Railroad Company Liable for Injury to Cattle Trespassing on Adjoining Lands.**—It is held in some States that a railroad company failing to maintain a fence as required by statute is liable to the owner of cattle injured in consequence though he may not be the owner of adjoining land. *Gilmore v. European & N. A. R. Co.*, 60 Me. 237; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48; *Indianapolis, etc., R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville, etc., R. Co. v. Applegate*, 10 Ind. 49; *Indianapolis, etc., R. Co. v. Paramore*, 12 Ind. 406; *Hart v. Indianapolis, etc., R. Co.*, 12 Ind. 478; *McCall v. Chamberlain*, 13 Wisc. 640; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42; *Curry v. Chicago & N. W. R. Co.*, 43 Wisc. 665; *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427; *Shephard v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641; *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353; *Spinner v. New York Central & H. R. R. Co.*, 67 N. Y. 153; *Watier v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. R. Cas. 582.

**Railroad Company not Liable for Injuries to Cattle Trespassing as above.**—But in other States it is held that where the cattle are trespassing upon the abutting premises and are injured through a failure on the part of the company to maintain its fences, the company is liable. *Woolson v. Northern R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 150; *Bemis v. Connecticut, etc., R. Co.*, 42 Vt. 375; *Morse v. Rutland, etc., R. Co.*, 27 Vt. 49; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield R. Corp.*, 115 Mass. 564; *Pittsburgh, etc., R. Co. v. Methuen*, 21 Ohio St. 586; *Walsh v. Virginia City, etc., R. Co.*, 8 Nev. 111.

**Cattle on Adjoining Lands by License of Owner.**—But the company is liable for injuries to cattle which are on land abutting on the road by license of the owner. *Sawyer v. Vermont & M. R. Co.*, 105 Mass. 196; *St. Louis, etc., R. Co. v. Dudgeon*, 28 Kans. 283.

**Wilful or Wanton Misconduct.**—It is generally admitted that when the railroad company has been guilty of negligence or in any event of wilful and wanton misconduct, it will be held liable whether the cattle injured were trespassing on the abutting land or not. *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Morse v. Rutland & B. R. Co.*, 27 Vt. 49; *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375; *Maynard v. Boston & M. R. Co.*, 115 Mass. 468; *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564; *Trout v. Va. & T. R. Co.*, 23 Gratt. 619; *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.



## MISSOURI PACIFIC RY Co.

v.

WALTHERS.

(78 *Missouri Reports*, 617.)

In an action under the double damage act for killing stock, evidence offered by the plaintiff of the condition of the fencing at the point where the stock was killed, and which also furnished circumstances from which a reasonable inference could be drawn that such stock had there entered upon the railroad track; *held*, admissible and properly submitted to the jury; *held*, also, that proof of the condition of the fencing at a particular point was, in the discretion of the court, properly admitted before proof, or an offer to prove, that such stock entered upon the railroad at that point.

Where a railroad company erects and uses diligent effort to maintain its fences, but strangers throw them down, it will not be liable for the killing of stock which enter upon its track through the breach.

APPEAL from Cole Circuit Court.

Thomas J. Portis and Smith & Krauthoff for appellant.

M. J. Leaming and Edwards & Davison for respondent.

WINSLOW, C.—This action was originally commenced before a justice of the peace, in Cole County, Missouri, under the double damage act, for killing stock belonging to plaintiff. There was a judgment by default before the justice, an appeal to the circuit court, where there was a trial by jury, which resulted in a verdict for plaintiff for \$100, which was doubled by the court, and judgment rendered against defendant thereon for \$200. To reverse this judgment, defendant brings the case here by appeal. Many questions are made on the record as to the sufficiency of the complaint, the jurisdiction of the justice, etc., but, since the recent numerous decisions of this court on these points, counsel for appellant have wisely abandoned them. The only questions now urged grow out of the introduction of testimony, and the action of the court on the instructions.

Plaintiff testified in his own behalf, that he was owner of the cows sued for, and that they were killed on defendant's track, at a point where there were cultivated fields on both sides of said railroad, and that he resided in Liberty Township, Cole County; the fence was not more than two feet high where the cows were killed, and along the lane, east of where they were killed, about half a mile, the fence was not more than four or five rails high; the cows were killed dead, and were appraised at \$100; I saw tracks on the railroad near where they were killed. On cross-examination, he said the animals were killed thirty or forty yards east of the

Moreau bridge; and that he did not know of a place near where they were killed, where the fencing was often thrown down by persons going through. His other witnesses made similar statements as to this place in the fence.

John Walthers testified: I saw the cows. The Pacific railroad killed them—three head. It is cultivated fields on both sides of the railroad there. I think \$40 per head is reasonable for the cows. The fence is bad where the animals were killed. The fence was not more than two or three feet high. I saw tracks on the railroad. We could not see any tracks east of where the cows were killed. The weeds and grass were very thick.

Geo. A. Walthers testified: I know these cows; two cows and one heifer. I saw them on the railroad; saw their tracks on the railroad. Two were killed dead, the other died in about an hour after. It is cultivated fields on both sides of the railroad where the cows were killed. The fence is poor, many rails are rotten. Fence is sometimes three, four, five, six, and sometimes seven rails high. The cows were worth \$40 each.

This was all of plaintiff's evidence.

Defendant introduced George Coleman, who said: I am now and was when the cattle were killed, foreman on this section where they were killed. They got on the railroad track ten rods east of the Moreau bridge. The railroad fence was down on both sides, thrown down by some one that night. The farmers on the north and on the south side of the railroad cross there on mules and horses so as to cut off some distance, and they always leave the fence down. My men put that fence up five times a week sometimes. We always put it up good when we found it down, without any delay. I, with my men, put this fence up good the morning before these cattle were killed. The morning the cattle were killed I came down to them. I then went to the place where people throw the railroad fence down. It was down again. I tracked these cattle right into this gap in the fence. Some fresh cow-dung was on the rails where they stepped over them. I then tracked them from the gap straight to where they were killed. I also saw where they had grazed along up to where they were killed. I put this fence up again.

F. Hardwick testified: I work on the section where the cattle were killed. I remember where they were killed. We put the fence up good at a place near Moreau bridge the morning before these cattle were killed. I saw the tracks where the cattle came in, about two telegraph poles from Moreau river. The fence is often down there. We often find it down, and always put it up when we find it down. It was down when we came to look at the cattle. We put it up good the morning before.

On this evidence the court instructed the jury for plaintiff as follows:

1. If the jury find from the evidence that plaintiff was, on or about the 2d day of August, 1879, the owner of the three cows mentioned in the complaint, and that said cows got on the road of defendant where the same runs through, along or adjoining an inclosed or cultivated field, and that defendant did not have erected a good and substantial fence on the sides of its railroad, of the height of at least five feet, or have then and there cattle-guards at road-crossings at such points where said railroad passes said cultivated field sufficient to prevent cattle from crossing; that said cows were killed at the time aforesaid by defendant's engine or train of cars, and that the same was done in Liberty Township, in Cole County; then the jury will find for plaintiff and assess his damages at whatever sum they may believe he has sustained by reason of the killing, not to exceed the amount claimed.

And refused to instruct the jury for defendant as follows—the first asked being in the nature of a demurrer to the evidence:

2. If the jury believe from the evidence that plaintiff's cattle got upon defendant's right of way in consequence of the fence belonging to defendant having been thrown or otherwise taken down at the point where said cattle got upon defendant's right of way, and that defendant's servants put the fence up at said point whenever they found it was down, and that defendant's servants had put up the fence at such point the morning before the said animals were killed, then defendant is not liable, and this, although the jury may believe from the evidence that defendant's fence was not lawful at other places, at or near where said animals were killed.

We do not think the trial court erred in admitting plaintiff's testimony under the complaint; nor in refusing defendant's first instruction, to the effect that under the pleadings and evidence plaintiff was not entitled to recover. Plaintiff testified positively that the "cows were killed on defendant's track at a point where there were cultivated fields on both sides of said railroad." John Walters said, "It is cultivated fields on both sides of the railroad there," meaning where he saw the stock dead. Geo. A. Walters said: "It is cultivated fields on both sides of the railroad where the cows were killed." Other evidence proves clearly that the fencing was down and in bad condition at the point designated by these witnesses. This, and other evidence shown by the record, tended to sustain the complaint, and was sufficient to justify the submission of the case to the jury. There was not an entire failure of proof.

But counsel insist, and objected to the introduction of the evidence on the ground that plaintiff should not have been permitted to offer any evidence of the condition of the fencing at the point in controversy, without first establishing or offering to establish that the animals entered the right of way at that point. Plaintiff offered no direct and positive evidence to this effect, but

the evidence objected to furnished strong circumstances from which the jury might reasonably infer that such was the fact. The order in which evidence shall be given to the jury is largely within the discretion of the trial court; and we cannot see that there was any abuse of that discretion in this case. *Powell v. Railroad Co.*, 35 Mo. 457; *State v. Daubert*, 42 Mo. 239; *Cross v. Williams*, 72 Mo. 577; *Russell v. Berkstresser*, 77 Mo. 417. Nor can it avail that defendant's evidence was positive to the contrary; for that circumstance, at the most, only called for a rule, not applicable here, to the effect that it should be given more weight. *Sullivan v. Railroad Co.*, 72 Mo. 195; s. c., 6 Am. & Eng. R. R. Cas. 583. Besides, defendant's evidence was very little less positive than plaintiff's, as will be seen on examination.

The court erred in refusing defendant's second instruction. It has long been settled in this State that under the double damage section of the statute, the plaintiff must allege and prove that his stock got upon the railroad track at a point where the company was bound to fence; and, failing in this, there could be no recovery. *Cecil v. Railroad Co.*, 47 Mo. 246; *Clardy v. Railroad Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 555. Plaintiff's evidence tended to establish these facts, and was sufficient to justify the instruction given for him, and the submission of his case to the jury. But the rule is equally established, as concisely stated by Hough, J., in *Clardy v. Railroad Co.*, 73 Mo. 578; s. c., 7 Am. & Eng. R. R. Cas. 555; and *Sherwood, C.J.*, in *Case v. Railroad Co.*, 76 Mo. 670; s. c., 13 Am. & Eng. R. R. Cas. 564, that: "After fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences, and it is, therefore, entitled to a reasonable time in which to make repairs, after having knowledge of a defect therein, or after the period has elapsed, in which, by the exercise of reasonable diligence, it could have had knowledge of such defect. *Shearman & Redfield on Neg.*, § 459, and cases there cited." *Clardy v. Railroad Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 555; *Case v. Railroad Co.*, 75 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

Now, the defendant's uncontradicted evidence plainly tended to show that at the point where plaintiff's stock went upon the track, it had erected and diligently maintained lawful fences, down to the very day of the accident; that neighbors passing on horseback threw the fencing down, for their own convenience, as they were in the constant habit of doing, and that in consequence thereof, plaintiff's stock got upon the track and were killed. It was the purpose of defendant's second instruction to submit these facts to the jury, and under the evidence and the cases above cited, it should have been given. If the court was not satisfied with its form, it should have put it in proper form, and submitted the defence to the jury.

The judgment should be reversed and the cause remanded. All concur.

A motion for rehearing was overruled.

**Duty of Railroad Company to Repair Fences.**—Upon this point see *Hannibal & St. Jo R. Co. v. Rutledge*, and note, *infra*.

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HANNIBAL AND ST. JOSEPH R. R. Co.

v.

MORRIS.

(79 Missouri Reports, 367.)

In an action for double damages for killing plaintiff's hog, the petition alleged that the hog was killed at a point on defendant's railroad track where the same was not inclosed by a lawful fence sufficient to prevent the hog from getting on the track, and that plaintiff's damage was caused by the failure of defendant to erect and maintain lawful fences sufficient to prevent the hog from straying on the track. *Held*, that this sufficiently showed that the animal came upon the track by reason of the company's failure to fence, and the petition was good after verdict.

It is the rule that a railroad company is entitled to a reasonable time after it discovers its fences to be out of repair, or after it could in the exercise of reasonable diligence have made the discovery, in which to make the necessary repairs, and until that time has elapsed is not liable under the 43d section of the Railroad Law for animals killed on the track; but this rule can have no application in a case where it is shown that there was no fence at all.

This court will not reverse a judgment for error in instructions given below, if it is manifest that the appellant has not been injured.

Under the 43d section of the Railroad Law, the companies are required to fence everywhere along their lines outside of towns and cities, except at public crossings and depot grounds; and the fact that a public highway runs alongside a railroad and adjoining it does not exempt the company from this duty.

APPEAL from Buchanan Circuit Court.

Geo. W. Easley for appellant.

Thos. Ryan for respondent.

HOUGH, C.J.—This is a suit under the 43d section of the Railroad Law (R. S., § 809), for damages for stock killed and injured by reason of the failure of defendant to erect and maintain fences as required by law. The petition contains three counts which are substantially the same, except as to dates and the description of the stock killed and injured.

The first count is as follows: Plaintiff states that defendant is

indebted to him in the sum of \$15 for the killing of one hog, the property of plaintiff, by defendant's engines and cars, which were used and operated by the agents and servants of defendant; that plaintiff's said hog was killed as aforesaid on the 1st day of April, 1879, at a point of defendant's railroad track, and at a point where the same was not inclosed by lawful fence sufficient to prevent plaintiff's said hog from getting upon defendant's said track, and where said railroad track runs through, along, and adjoining the inclosed pasture field of plaintiff; that the point where said hog got upon defendant's railroad, and where said hog was killed, is in Washington Township, Buchanan County, Missouri; that said hog was not killed at any public or private road crossing on defendant's said railroad track; that plaintiff has been damaged as aforesaid by reason of the failure of defendant to erect and maintain lawful fences sufficient to prevent plaintiff's said hog from straying on defendant's railroad track as aforesaid; and that by virtue of section 43, article 2, chapter 37, Wagner's Statutes of Missouri, and of the amendment thereto, plaintiff is entitled to recover of defendant double the value of said hog; wherefore plaintiff asks judgment for \$30 and costs.

The sufficiency of this petition was assailed at the trial and is denied here. Under the decision of this court in *Edwards v. Railroad Co.*, 74 Mo. 117, this petition is good after verdict.

The defendant also contends that the judgment is without evidence to support it, inasmuch as no testimony was offered from which it could be determined whether the defendant was guilty of negligence in failing to repair its fence, the plaintiff having failed to show how long the fence had been down. In *Clardy v. Railroad Co.*, 73 Mo. 576, this court said that "after fences have once been erected as required by law, the company is only liable for a negligent failure to maintain such fences; and it is, therefore, entitled to a reasonable time in which to make repairs after having knowledge of a defect therein, or after that period has elapsed in which, by the exercise of reasonable diligence, it could have had knowledge of such defect." The objection to the sufficiency of the evidence cannot be sustained in this case, as it does not appear from the record before us that the defendant ever constructed a lawful fence where the stock injured and killed entered upon its right of way. Indeed it is fairly inferable from the testimony that the defendant did not perform its statutory duty in that regard. *Chubbuck v. Railroad Co.*, 77 Mo. 591.

It is further contended that the court erred in not confining the jury to a finding of the value of the animals injured and killed. The instruction given by the court directed the jury to assess the damages "at such sum as they might believe from the evidence that plaintiff had suffered by the killing or injuring of his hogs, not to exceed the amount claimed in his petition," which was



double the value of the hogs. There is no conflict in the evidence as to the value of the hogs injured and killed; and the verdict of the jury on each count was for the precise sum which the witnesses stated they were worth, and the sum was doubled by the court. Conceding the instruction of the court to be erroneous, it is manifest that the defendant has not been injured thereby.

The third count of the petition is for injuries to a mare which the testimony shows came upon the defendant's right of way from a public road which runs parallel with the defendant's track and adjoins its right of way; and the defendant contends, on the authority of *Walton v. Railroad Co.*, 67 Mo. 58, that in such case it is not liable for double damages for its failure to erect and maintain a lawful fence between its right of way and the highway, and that plaintiff's action should have been brought under the 5th section of the Damage Act for single damages. The case of *Walton v. Railroad Co.* was decided under the statute requiring fences to be constructed when the right of way of the railroad adjoins in closed or cultivated fields and uninclosed prairie lands. In that case it appeared that there was a strip of inclosed timber land lying on either side of the railroad and separating the right of way from the inclosed fields beyond, and it was held that the defendant was not liable for double damages, but only for single damages under the 5th section of the Damage Act. That decision is undoubtedly correct, but the point in judgment there is inapplicable here. In that case, it is true, the reasoning of this court in *Robinson v. Railroad Co.*, 57 Mo. 494, was criticised, but the judgment was approved as it was a suit for single damages under the 5th section of the Damage Act. The statute under which these cases were decided has been amended however, and whatever difference of opinion may exist as to the duty of the railroad to fence under the old law, we are all of opinion that fences are now required to be erected everywhere outside of towns and cities, except at public crossings and depot grounds.

The judgment of the circuit court will be affirmed.

All the judges concur.

**Duty of Railroad Company to Repair Fences.**—For a full collection of the authorities on this point, see *Hannibal & St. Jo R. Co. v. Rutledge*, and note, *infra*.

## HANNIBAL AND ST. JOSEPH R. R. Co.

v.

RUTLEDGE.

(78 *Missouri Reports*, 286.)

A county road ran parallel with and immediately adjoining the right of way of a railroad company, where the latter passed through uninclosed prairie lands. *Held*, that this did not exempt the company from the duty to fence imposed by the 43d section of the Railroad Law of Missouri.

Under this section, a railroad company is not chargeable as an absolute insurer of its fences, but with the exercise of ordinary care, only, in keeping them in repair. Ordinary care, however, is a relative term, to be measured by the nature of the case, the hazard, and the situation. In keeping up its fences, the care required by a railroad company is not limited to such as would be used and exercised by an ordinarily careful farmer.

APPEAL from Shelby Circuit Court.

Geo. W. Easley for appellant.

R. P. Giles and King for respondent.

PHILIPS, C.—This is an action for damages for killing cattle by the defendant railroad, based on what is known as the 43d section. Wag. Stat., art. 2, ch. 37. There were three counts in the petition. It is not necessary to set them out as they are good in form. The answer is a general denial.

On the trial, plaintiffs introduced testimony tending to prove that during the years 1878, 1879, and 1880, plaintiffs were partners and were still such, and were the owners of the stock described in their petition; that all of the stock sued for by plaintiffs in this cause were killed and crippled by defendant at the times set out in plaintiffs' petition, and were of the value therein claimed; that all of said stock were killed and crippled between the corporation line at Clarence station and three miles east of there, Messick crossing, being three miles east of Clarence station, except one head of said stock valued at \$20, which was struck and killed on said Messick public road crossing; that the south line of defendant's fence between said Messick crossing and Clarence station was at the time stated in plaintiffs' petition out of repair, and that there were at each of said times when said stock was injured, several places that stock could have and had gone through and got upon defendant's track, although some ordinary repairs had been made on said fence by defendant, a little before the stock was killed on the 25th day July, 1879; that defendant's right of way was inclosed from Clarence to Messick's crossing, and plaintiffs' stock and the stock of others grazed on the uninclosed prairie lands south of the de-

defendant's inclosure; that there is a public highway running along adjoining to, located on the unimproved prairie lands and parallel with defendant's right of way on the south side, and extending from Messick public road crossing to Clarence station, except that travellers have deviated from a straight line for their own convenience and gone some fifty yards farther south than the road is located in order to get by bad places in the road, but that said public highway south of the track is a county road; that the land south of said public road was uninclosed prairie land, and that there were cultivated fields on the north side of defendant's track.

Whereupon the defendant prayed the court to instruct the jury as follows: "Admitting all of the facts adduced by plaintiffs to be true, the finding must be for defendant." Which instruction the court refused to give. To the action of the court in refusing to give said instruction, defendant at the time excepted.

Defendant then introduced testimony tending to prove that all of the stock sued for in the first and fourth counts of plaintiffs' petition was killed and crippled while on Messick's public road crossing; that its south line of fence had been repaired the evening the stock was killed, sued for in the third count of plaintiffs' petition, but that said stock was inclined to be breachy and had to be driven away that evening by defendant's employees; that the fence where the stock got through and which is sued for in plaintiffs' third count had been originally a good and sufficient fence, five feet high, and although it had been out of repair before, yet at the time said stock was killed, it was in places in ordinarily good condition, and sufficient to keep out stock if it had not been breachy and inclined to break through. Thomas Mitchell, a witness for defendant, then identified Messick public road crossing and defendant's track as being on the east line of section 23, township 57, range 12. Defendant offered in evidence the order of the county court of Shelby County, establishing and locating a public highway from the town of Clarence, Shelby County, to the east line of section 23, township 57, range 12, which said record was admitted by plaintiffs as being the record and order of the county court of Shelby County. To the introduction of said record in evidence plaintiffs objected, because irrelevant and immaterial, which said objection was by the court overruled. Defendant then read said record and order of said county court in evidence.

It is not deemed essential to set out the instructions given for plaintiffs, as no questions arise on them worthy of discussion. The following instructions were requested by defendant and refused:

1. The court declares the law to be that under the pleadings and evidence plaintiffs cannot recover, and the finding should be for defendant.

2. The court declares the law to be that defendant is not re-

quired under section 809, Revised Statutes, to fence its track at a place where there is a public highway running parallel with and adjoining its right of way, and if the stock sued for came upon defendant's track by reason of a failure to fence at such place, they should find for defendant.

3. If the jury believe from the evidence that the stock sued for was struck on defendant's track between the Messick public road crossing and Clarence station, and that in the year 1870 there was a public highway located on a line with the south boundary of defendant's right of way and adjoining and running parallel with said right of way between said Messick crossing and Clarence, then defendant was not bound to fence on the south side of its track between said points, and plaintiffs cannot recover for failure to fence at said place, in this case, and they should find for defendant.

4. If the jury believe from the evidence that the fence, where plaintiff's stock sued for in the third count of the petition went through and upon defendant's track, was originally a good and sufficient fence four and one-half feet high, and that it had been repaired the night before the stock sued for in the third count of plaintiffs' petition were killed, and that defendant exercised ordinary care in keeping said fence in repair, then defendant is not liable for the stock sued for in said third count; and by ordinary care, as used in this instruction, is meant such care as would be used and exercised by an ordinarily careful farmer in keeping up his fences.

The court upon its own motion instructed the jury as follows: Unless the jury find that the defendant's fence west of Messick's crossing and along the south line of its right of way was so far defective as to permit cattle to enter upon its railroad; and unless they further find that the cattle described in the petition, or some one or more of them, did by reason of such defects in said fence, enter upon defendant's railroad, they should find a verdict for defendant upon all the counts in the petition.

The jury found the issues for the plaintiffs, except as to one of the cows killed on the road crossing. The defendant brings the case here on appeal.

I. It is insisted that the court erred in refusing the second and third instructions asked by the defendant. The evidence showed that on the south side of defendant's road-way was "uninclosed prairie lands." Unquestionably then, by the 43d section of the statute in question, it was the duty of defendant to erect and maintain a good and substantial fence on that side of its road. But defendant claims that inasmuch as a county road had been laid out and used, running parallel with the railroad track, and next to the right of way, its road did not pass "along or adjoining uninclosed prairie lands." This construction of the statute is too extreme.

It is contrary to both its letter and spirit. The statute must be construed in reference to the object sought to be attained by the legislature, and language employed must be "understood in its plain, ordinary, popular sense." *Burnam v. Banks*, 45 Mo. 350. The recognized object of this and similar statutes is to afford, not only protection to private property, but to the lives and limbs of passengers travelling on the railroad.

As such "uninclosed prairie land" was likely to invite cattle running at large, and their known propensity, amounting to a perversity, to pass on to the railroad track, when grazing near it, it is unreasonable to say that because there is an artificial highway next to the railroad, the duty to fence ceases. The county road is on the prairie land. It does not cease to be "uninclosed prairie land" because a county road runs over it. Suppose it had been a natural water-way, a common creek forty or sixty feet wide, instead of an artificial road-way, would the obligation to fence between it and the railroad-way be removed? This question was expressly decided in *Robinson v. C. & A. R. R. Co.*, 57 Mo. 494. It is true the reasoning of *Wagner, J.*, is criticised in *Walton v. St. Louis, I. M. & S. Ry. Co.*, 67 Mo. 56, but I do not understand that its authority is overturned. Both of these cases, in my opinion, are correct, and may well stand together. They afford an illustration of a truth which good practitioners too often overlook, that a principle of law remains the same, but the particular facts of each case may limit the application. *Redfield Ry.*, (5 Ed.) 516, 517; *Tredway v. S. C. & St. P. R. Co.*, 43 Iowa, 527.

II. The only remaining question raised is the refusal of the court to grant the fourth instruction asked by defendant. The statute makes it the duty of railroads to erect and maintain good fences. It does not perform its duty to the public by merely erecting a fence. It must keep it up and in repair. It does not, however, become the absolute insurer of the fence. The fence is liable to many casualties, against which no reasonable care and vigilance could guard. A wind storm, a water freshet, a fire, breachy stock or trespassers might destroy it. In such case it would be utterly unreasonable to hold the corporation liable for stock killed which entered through a defect thus occasioned. The law allows reasonable time to discover the defect and repair it. In other words, it holds the company to the exercise of due care and no more. *Clardy v. St. Louis, I. M. & S. Ry. Co.*, 73 Mo. 576; s. c., 7 Am. & Eng. R. R. Cas. 535; *Case v. St. Louis & St. F. R. R. Co.*, 75 Mo. 668; s. c., 13 Am. & Eng. R. R. Cas. 564.

The law deals, as it should, with a railroad in this respect as with an individual. It exacts of it the exercise of ordinary care. But there is often a misapprehension of the term "ordinary care." It is a relative term. It must necessarily be measured by the nature of the case, the hazard, the situation. It "means simply the caution

and vigilance which reasonable and prudent men exercise under like circumstances." *Shearman & Redfield Neg.*, §§ 20, 23; *Cayzer v. Taylor*, 10 Gray, 280; *Thompson Neg.*, 2 vol. 982, 983. Manifestly then the fourth instruction in question ought not to have been given, for it proceeds to tell the jury that "by ordinary care, as used in this instruction, is meant such care as would be used and exercised by an ordinarily careful farmer in keeping up his fences." The duties and situation of a farmer in respect of keeping up his fences are unlike those of a railroad company. The farmer keeps up his fences as a means of protecting his own premises. He owes no public duty in the matter. He alone can suffer by not having a fence. He may suffer his premises to go unfenced. Stock in going on to his premises incur no peril. He has running to and fro over his farm at a speed of twenty miles an hour, no massive machinery freighted with human life, and destructive to any beast in its pathway. What would be ordinary care in the farmer might be gross negligence in the railroad. The teamster who drives his plodding team over the highway must exercise "ordinary care" to avoid collisions and injury to others on the road. So must the engineer in running his train exercise "ordinary care." But could it be said that the engineer rushing with his terrible engine on two narrow rails, with five hundred human lives suspended on his hands and eyes, should keep no keener or more ceaseless vigil than the ordinary teamster? The situation is different, the peril and the duty greater. The instruction in the form it was asked was properly refused.

It may be as well to observe, too, that where the first two injuries occurred there was no pretence that the fence was in repair. In respect of the occasion of the last injury, the bill of exceptions shows, on defendant's part, that "the fence had been out of repair before, yet at the time said stock was killed, it was in places in ordinarily good condition and sufficient to keep out stock, if it had not been breachy and inclined to break through." This was in effect an admission that along the point in question there were places not in ordinarily good condition; and at its best it was only "in ordinarily good condition." It is not stated to be "a good substantial fence," as required by the statute. The breachy inclination of the stock has nothing to do with this question. If the railroad company complies with the statute, it may, in the absence of other negligence, run over and kill any stock trespassing on its right of way. If it fails to have the statutory fence, it may not kill, even a breachy animal. There was, therefore, scarcely evidence sufficient to justify the fourth instruction. The case seems to have been fairly tried, and, therefore, the judgment of the circuit court is affirmed. All concur.

**PER CURIAM.**—For the reasons given in the foregoing opinion

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the judgment of the circuit court is affirmed. *HOUGH, C. J., concurs in the result.* The case of *Robinson v. R. R. Co.*, 57 Mo. 494, was a suit for single damages.

**Highways Running Parallel with Railroad Track.**—When a railroad track runs alongside of and parallel with a highway, the company is bound to maintain a fence. *Indianapolis, etc., R. Co. v. Guard*, 24 Ind. 222; *Indianapolis, etc., R. Co. v. McKinney*, 24 Ind. 283; *Jeffersonville, etc., R. Co. v. Sweeney*, 82 Ind. 480; *André v. Chicago, etc., R. Co.*, 30 Iowa, 107; *Hannibal & St. Jo R. Co. v. Rozzelle*, 79 Mo. 849; *s. c., supra*; *Louisville, N. A. & C. R. Co. v. Shanklin*, 94 Ind. 297; *s. c., supra*.

**Duty of Company to Repair Fences.**—A railroad company is bound to use reasonable care to keep its fences in repair. *Robinson v. Grand Trunk R. Co.*, 82 Mich. 222; *Lemmon v. Chicago & N. W. R. Co.*, 82 Iowa, 151; *Curry v. Chicago & N. W. R. Co.*, 43 Wisc. 661; *Henderson v. Chicago, etc., R. Co.*, 48 Iowa, 620; *Estes v. Atlantic & E. R. Co.*, 63 Me. 309; *Clardy v. St. Louis, etc., R. Co.*, 7 Am. & Eng. R. R. Cas. 555; *Varco v. C., M. & St. P. R. Co.*, 11 Am. & Eng. R. R. Cas. 419; *Bennett v. Wabash, etc., R. Co.*, 18 Am. & Eng. R. R. Cas. 649; *Evans v. St. Paul, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 658.

**Notice of Defect.**—When an accident occurs to a fence a railroad company is entitled to a reasonable time to discover the defect before it can be held liable for an injury occurring in consequence. *Spinner v. New York C. & H. R. R. Co.*, 67 N. Y. 158; *Great Western R. Co. v. Helm*, 27 Ill. 196; *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226; *Chicago & A. R. Co. v. Saunders*, 85 Ill. 288; *Indianapolis & St. L. R. Co. v. Hall*, 88 Ill. 368; *Norris v. Androscoggin R. Co.*, 89 Me. 274; *Murray v. New York, etc., R. Co.*, 4 Keyes (N. Y.), 274; *Brown v. Milwaukee, etc., R. Co.*, 21 Wisc. 39; *Missouri Pacific R. Co. v. Walthers*, 78 Mo. 617; *s. c., supra*; *Missouri Pacific R. Co. v. Fitterling*, 79 Mo. 504; *s. c., infra*.

**Implied Notice from Lapse of Time.**—It can only be held liable where it has had notice of the defect or where such time has elapsed that notice may be presumed, notwithstanding which it fails to repair. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa, 459; *Perry v. Dubuque S. W. R. Co.*, 86 Iowa, 102; *Hilliard v. Chicago & N. W. R. Co.*, 87 Iowa, 442; *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa, 292; *McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa, 193; *Hammond v. Chicago & N. W. R. Co.*, 48 Iowa, 168; *Toledo, W. & W. R. Co. v. Cohen*, 44 Ind. 411; *Pittsburgh, C. & St. L. R. Co. v. Ely*, 55 Ind. 567; *Chicago & A. R. Co. v. Umphenour*, 69 Ill. 198; *Illinois Central R. Co. v. Swearingen*, 47 Ill. 206; *Toledo, W. & W. R. Co. v. Nelson*, 77 Ill. 160; *Chicago, etc., R. Co. v. Barrie*, 55 Ill. 227; *Varco v. C., M. & St. P. R. Co.*, 11 Am. & Eng. R. R. Cas. 419; *Fritz v. Kansas City, etc., R. Co.*, 13 Am. & Eng. R. R. Cas. 558; *Pittsburgh, C. & St. L. R. Co. v. Smith*, 13 Am. & Eng. R. R. Cas. 579.



**ANIMALS—Continued.**

should return. It then ran on the track again and was killed. *Held*, that company was not liable unless engineer could have stopped train and avoided injury after animal ran on track second time. *Wilson v. Norfolk & Southern R. Co.*, xix. 458.

When engineer sees cattle ahead on track, he must act with due regard to safety of passengers and property of company; but company is not exempt from liability except in case of gross negligence. *Simkins v. Columbia & G. R. Co.*, xix. 467.

Engineer is bound to keep lookout ahead for animals on track and to avoid injury to them if he can do so, having due regard to safety of passengers and property of company. *Simkins v. Columbia & G. R. Co.*, xix. 467.

Engineer is bound to exercise proper watchfulness to discover animals on track, and is bound to exercise reasonable efforts to avoid harming them when discovered. *Little Rock & Ft. S. R. Co. v. Holland*, xix. 479.

When horse killed leaped on track so close to engine that it could not have been stopped in time to avoid injury, railroad company is not liable, provided engineer kept such a proper lookout as his own duties permitted. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

In action for killing cattle, question whether engineer is negligent in running train at speed of 38 or 40 miles an hour is for jury. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

Animal came on track 60 yards in front of engine. Engineer immediately put on brakes, reversed engine, and sounded alarm-whistle, but was unable to prevent accident. *Held*, that railroad company was not liable. *Little Rock & Ft. S. R. Co. v. Turner, Adm'r*, xix. 491.

When killing of cattle could have been prevented by exercise of reasonable care and vigilance, company is liable. *Chicago, R. I. & P. R. Co. v. Kendig*, xix. 498.

When animal could have been seen ahead on track in time to avoid injury to it, but no precautions were taken and it was run over and killed, the railroad company was held liable. *Kansas City, Ft. S. & G. R. Co. v. Hines*, xix. 495.

When stock wrongfully on the track is run over by passing train and killed, company is liable unless engineer kept reasonable lookout ahead and used reasonable care to avoid collision after discovering the stock. *Memphis & L. R. Co. v. Sanders et al.*, xix. 497.

In action for killing cattle, jury had no right to find that trains could have been stopped within shorter space, considering its rate of speed, when there was no evidence to warrant the finding, but evidence was all the other way. *Union Pacific R. Co. v. Shannon*, xix. 500.

When engineer sees cattle ahead near track under circumstances indicating danger of their getting on the track, he is bound to use all means to frighten them off. *Alabama Gt. S. R. Co. v. Powers*, xix. 502.

When engineer perceives cattle ahead on or near the track, he is bound not only to give alarm-whistle, but to slack or stop the train if necessity requires. *Alabama Gt. S. R. Co. v. Powers*, xix. 502.

Engineer's duty is not limited to exercising care after he perceives cattle ahead on track. He is bound to keep lookout so as to see them in time to avoid injury. *Alabama at. S. R. Co. v. Powers*, xix. 502.

Where animals are killed at crossing in consequence of failure of engineer to give statutory signals, company is liable. *Kansas City, St. J. & C. B. R. Co. v. Turner*, xix. 506.

In action for killing cattle, fact that speed of train was greater than customary, though not in excess of rate allowed by statute and rules of company, is no evidence of negligence. *Louisville & N. R. Co. v. Marriott*, xix. 509.

Engineer seeing cattle ahead on track is not bound to stop train, unless he can do so consistently with safety of passengers. *Louisville & N. R. Co. v. Marriott*, xix. 509.

In action for killing animal on track, no rate of speed is negligence *per se*. *Hannibal & St. Jo R. Co. v. Young*, xix. 512.

Engineer observing animals near track is not bound to stop train or take other



**ANIMALS—Continued.**

In Missouri, engineer approaching crossing is not bound to sound both bell and whistle. Either is sufficient. *Kansas City, St. J. & C. B. R. Co. v. Turner*, xix. 506.

**TRESPASSING OR STRAYING CATTLE AND CONTRIBUTORY NEGLIGENCE.**

When killing of animals trespassing on track is shown to have been caused by train, court may properly refuse to charge that company is not liable unless guilty of gross negligence or wilful injury. The company is liable for ordinary negligence, which is presumed. In this case there was no evidence of contributory negligence. *Jones v. Columbia & G. R. Co.*, xix. 459.

When horse is in its owner's pasture through which railroad company has right of way, it is not a trespasser on the railroad-track, even under terms of stock law. *Simkins v. Columbia & G. R. Co.*, xix. 467.

Fact that owner of stock permits them to run at large and trespass on railroad-track does not preclude him from recovering damages for killing of such cattle by trains. *Alabama Gt. S. R. Co. v. Powers*, xix. 502.

In action for killing stock at crossing, fact that plaintiff allowed them to stray at large on highway near railroad is no defence. *Kansas City, St. J. & C. B. R. Co. v. Turner*, xix. 506.

Party is not guilty of contributory negligence in allowing cattle to run at large so as to defeat recovery for killing caused by failure to fence. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

**GENERAL PRINCIPLES AS TO FENCE LAWS.**

Company is only liable for injury to animals occasioned by defective fences when cattle were at time running at large. *Brentner v. Chicago, M. & St. P. R. Co.*, xix. 448.

Kansas fence law is operative within boundaries of Fort Leavenworth Military Reservation. *Chicago, R. I. & P. R. Co. v. McGlinn*, xix. 522.

Fence laws apply to all species of animals, including sheep and swine. *Halverson v. Minneapolis & St. L. R. Co.*, xix. 526.

Fence laws are constitutional. In what manner and to what extent fences must be erected lies within legislative discretion. *Chicago, M. & St. P. R. Co. v. Dumser*, xix. 545.

When evidence failed to show that cattle strayed on track at point where company was bound to fence and failed to do so, there can be no recovery. *Bremmer v. Green Bay, S. P. & N. R. Co.*, xix. 575.

In action for killing stock, material point to be averred and proved is whether road was fenced at point where animals got upon track. *Wabash, St. L. & P. R. Co. v. Tretts*, xix. 601.

Company leasing road is bound to maintain cattle-guards to prevent cattle straying upon improved land. *Missouri Pacific R. Co. v. Morrow*, xix. 630.

Company is liable for injury done to crops by failure to fence, notwithstanding fact that road was at time in hands of contractor who had nothing to do with fencing. *Pound v. Port Huron & S. W. R. Co.*, xix. 640.

Company is liable for injury to animals caused by failure to fence within reasonable time, even before trains begin to run. *Silver v. Kansas City, St. L. & C. R. Co.*, xix. 642.

Liability of company to build fences on both sides of road cannot be defeated by contract with another party to erect such fences. *Silver v. Kansas City, St. L. & C. R. Co.*, xix. 642.

In Canada, railroad company is not liable for killing horses of mere squatter by failure to fence. It is liable only to the "proprietor or tenant" of adjoining land. *Conway v. Canada Pacific R. Co.*, xix. 650.

Obligation to construct fences is not limited to protection and benefit of owners and occupiers of abutting land. *Pittsburgh, C. & St. L. R. Co. v. Allen*, xix. 657.

Company is not liable for injury to cattle caused by failure to erect statutory

**ANIMALS—Continued.**

fence, unless the animal was actually touched by engine or train. *Croy v. Louisville, N. A. & C. R. Co.*, xix. 608.

**SUFFICIENCY OF FENCE.**

Construction of wire fence *held* to be sufficient compliance with fence laws of Minnesota. *Halverson v. Minneapolis & St. L. R. Co.*, xix. 526.

Company is only bound to erect fence reasonably sufficient to prevent livestock coming upon track. *Shellabarger v. Chicago, R. I. & P. R. Co.*, xix. 527.

In Michigan, company may place gates and bars in fence wherever it deems it advisable. *Hoyt v. Detroit, G. H. & M. R. Co.*, xix. 627.

**WHERE FENCE MUST AND WHERE IT NEED NOT BE BUILT.**

Company is not excused from erection of statutory fence unless paramount interest of public intervenes or company owes paramount duty to public. No private interest or convenience of the company or of individuals will excuse erection of fence. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

A railroad company is bound to fence a portion of its station grounds not necessarily used by it as such. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

Burden of proof is on company to show that it is not bound to fence at certain point. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

When company is not bound to fence at certain point, it is bound to begin fence as near thereto as practicable. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

Company is not bound to fence its track at crossing of public street in city or town. *Long v. Central Iowa R. Co.*, xix. 541.

Courts will not hold company exempted from fencing station in country not within limits of platted city, town, or village. *Chicago, M. & St. P. R. Co. v. Dumser*, xix. 545.

When public highway crossing track has been abandoned for thirty years, it is no duty of the company to fence at the point. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 552.

Burden of proof is on company to show that it is not bound to fence at certain point. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 552; *Lake Erie & W. R. Co. v. Kneadle*, xix. 568.

When there is room to erect fences between railroad and adjoining parallel highway, company is bound to do so. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 552.

When company has by consent of county commissioners occupied highway by track for thirty years and public authorities have exercised no supervision over it and public have ceased to use it, company is bound to fence. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 555.

When company can fence its road without interfering with rights of public or management of road, it is bound to do so. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 555.

In Minnesota, companies are bound to put fences and cattle-guards at wagon-crossings as well within limits of cities and towns as in the country. *Greeley v. St. Paul, M. & M. R. Co.*, xix. 559.

Mere difficulty or inconvenience to the company does not excuse erection of statutory fence at certain point. It is only in case of public necessity that implied exception to statute prevails. *Greeley v. St. Paul, M. & M. R. Co.*, xix. 559.

Company is not bound to fence road at point where switch leaves main road leading to mill, grain-elevator, or the like. *Evansville & T. H. R. Co. v. Willis et al.*, xix. 565; *Lake Erie & W. R. Co. v. Kneadle*, xix. 568.

Burden is on plaintiff to show that road was not fenced at point where animal came on track. Company is then bound to show that it was not bound to fence there. *Lake Erie & W. R. Co. v. Kneadle*, xix. 568.



**ANIMALS—Continued.**

Company is not excused from fencing because way alongside of track is in use and necessary to reach stock-lots and cattle-chutes. *Banister v. Pennsylvania Co.*, xix. 570.

When highway runs parallel with railroad, company is bound to fence when it passes through inclosed fields or uninclosed land. *Hannibal & St. Jo R. Co. v. Rozzelle*, xix. 591.

Company is bound to fence track except at points where a fence would impair use of private property or rights of public. *Wabash, St. L. & P. R. Co. v. Tretts*, xix. 601.

Railroad company is not bound to fence track when by so doing it would exclude private proprietors from passage to highway. *Croy v. Louisville, N. A. & C. R. Co.*, xix. 608.

In action for killing animals by reason of want of fence, burden is on company to prove that road could not have been fenced at the point. *Louisville, N. A. & C. R. Co. v. Clark*, xix. 623.

When evidence shows that cattle were killed at point not a public crossing, jury may presume that company was bound to fence there. *Schlenger v. Chicago, M. & St. P. R. Co.*, xix. 625.

One company sold part of right of way to another company, who constructed parallel track. The purchasing company contracted with adjoining owner to fence. Said fence was insufficient, and cattle of stranger escaped on track of the first company and were killed. *Held*, that the said company was liable. *Pittsburgh, C. & St. L. R. Co. v. Allen*, xix. 657.

Company is bound to fence when county road runs parallel with and adjoining right of way through uninclosed prairie land. *Hannibal & St. Jo R. Co. v. Rutledge*, xix. 669.

**CATTLE-GUARDS.**

Cattle-guards must be put in at crossings of public highways and other public places so as to inclose track. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

In Minnesota, company must make cattle-guards at wagon-crossings in towns and cities as well as in country. *Greeley v. St. Paul, M. & M. R. Co.*, xix. 559.

Company is bound to put in and maintain cattle-guards at intersecting highways. *Wabash, St. L. & P. R. Co. v. Tretts*, xix. 601.

Damages are recoverable for injuries to crops caused by animals straying on account of failure of company to make cattle-guards. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

When, in consequence of failure of railroad company to make cattle-guards, plaintiff's field was thrown open to public and his grass and corn-stalks destroyed, *held*, that he was entitled to damages. *Raridon v. Central Iowa R. Co.*, xix. 615.

Company is not liable for injury to crops caused by failure to repair cattle-guard originally constructed by request of land-owner and kept in repair for thirty years by company. *Vicksburg & M. R. Co. v. Dixon*, xix. 617.

Complaint for injury to crops averred that company had failed to erect fences where road passed through inclosed or uninclosed land. *Held*, that this negatived possibility of animals having entered at highway crossing, and that in such action it was unnecessary to negative such possibility. *Chicago, R. I. & P. R. Co. v. Clare*, xix. 621.

Company must see that proper cattle-guards are maintained to prevent cattle straying into fields and injuring crops. *Missouri Pacific R. Co. v. Morrow*, xix. 630.

**REPAIRS TO FENCES.**

When company uses diligent effort to maintain fences, but strangers throw them down, company is not liable for injuries to cattle occasioned in consequence. *Missouri Pacific R. C. v. Walthers*, xix. 662.

**ANIMALS—Continued.**

When there is no fence, rule does not apply giving company reasonable time after discovering defect in fence to repair it. *Hannibal & St. Jo R. Co. v. Morris*, xix. 666.

Railroad company is not insurer of fences, but is bound to use reasonable diligence to keep them in repair. *Hannibal & St. Jo R. Co. v. Rutledge*, xix. 669.

**INJURIES TO CROPS.**

Damages are recoverable for injuries to crops caused by failure of company to erect cattle-guards. Damages may include injury done and also expense incurred in attempting to protect crops and prevent further injury. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

When, in consequence of failure of company to make cattle-guards, public got into plaintiff's field and destroyed his grass and corn-stalks, *held*, that the company was responsible in damages. *Raridon v. Central Iowa R. Co.*, xix. 615.

Company is not liable for injury to crops occasioned by failure to repair cattle-guard which it constructed originally at request of land-owner and has kept for thirty years in repair. *Vicksburg & M. R. Co. v. Dixon*, xix. 617.

Company must see that proper cattle-guards are maintained to prevent cattle straying into fields and injuring crops. *Missouri Pacific R. Co. v. Morris*, xix. 680.

When company enters on farm and takes down existing fences and straying cattle injure crops before new fences are erected, company is liable. *Pound v. Port Huron & S. W. R. Co.*, xix. 640.

**PLEADING.**

Complaint setting out ownership of steer, fact that it was killed by negligence of company's servants and amount of damages, is sufficient. *Chicago, R. I. & P. R. Co. v. Kendig*, xix. 498.

In action for killing animal on track, company pleaded that plaintiff was its servant and bound to keep track near a certain station free from trespassing animals, but that in violation of his duty he turned out the mare in question in immediate vicinity of station, whereupon she strayed through defective fence on track. *Held*, that plea was bad, as it did not aver that plaintiff was required to keep cattle from trespassing at point where mare entered on track. *Louisville, N. A. & C. R. Co. v. Skelton*, xix. 542.

Plea is bad which fails to aver that animal entered on track at station where company was not bound to fence. Averment that it entered upon track near station is insufficient. *Louisville, N. A. & C. R. Co. v. Skelton*, xix. 542.

In complaint for killing stock it is sufficient to allege that place where stock entered upon track "was not fenced." *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 552.

Complaint alleging that defendant's servants wrongfully acting in line of their duty and within scope of employment and under directions and instructions of defendant, killed the plaintiff's mule, is good on demurrer. *Bauister v. Pennsylvania Co.*, xix. 570.

Complaint averring that cow came on track at point where track ran along uninclosed fields and where it was not fenced, and not at the crossing of public highway, is sufficient. Such complaint shows that accident was caused by failure to fence, and need not aver that point was not within limits of incorporated town or city. *Missouri Pac. R. Co. v. Perriquer*, xix. 578.

Complaint need not distinctly aver that point at which stock entered on track was not within limits of incorporated city or town. *Missouri Pac. R. Co. v. Perriquer*, xix. 578.

In action for killing cow, complaint averred that animal was killed at "a certain point of uninclosed timber land," and that it came on track at point where company was bound to fence but had failed to do so. *Held*, that the complaint

## **ANIMALS—Continued.**

negated by implication that cattle came on track at crossing or at point within incorporated city or town. *Missouri Pac. R. Co. v. Wade*, xix. 586.

In action for killing cattle, complaint averred that they came on track and were killed at point on same where it passes through uninclosed land and not at crossing. *Held*, that this sufficiently negated possibility that killing occurred at station or within limits of incorporated city or town. *Missouri Pac. R. Co. v. Wade*, xix. 586.

In action for killing plaintiff's hogs, the complaint must state that hogs came on track at point where defendant was bound by law to fence, but failed to do so. *St. Louis, I. Mt. & S. R. Co. v. Asher*, xix. 593; *St. Louis, I. Mt. & S. R. Co. v. Nance* xix. 594.

Complaint merely stated that cattle came on track at point where company was required by law to fence and could have fenced. *Held*, that as it failed to aver that track was not fenced, it was insufficient. *Louisville, N. A. & C. R. Co. v. Quade*, xix. 595.

When complaint is otherwise sufficient, it need not state that road could have been fenced at point where stock entered upon it. *Louisville, N. A. & C. R. Co. v. Hall*, xix. 597.

Complaint averring that road was not fenced at point where animals got upon it, and at place where they were killed, is sufficiently definite. *Louisville, N. A. & C. R. Co. v. Harrigan*, xix. 598.

In action before justice of peace for killing cattle, complaint is not bad for failing to aver that road was not fenced where cattle entered upon it. *Louisville, N. A. & C. R. Co. v. Argenbright*, xix. 604.

In action before justice of peace for killing cattle, complaint need not directly aver that plaintiff was damaged or that damages were due and unpaid, when value of cattle is given. *Louisville, N. A. & C. R. Co. v. Argenbright*, xix. 604.

Complaint averring that animal strayed on track at point where road was not fenced, and that defendant "ran against and over said mare and killed her," not showing that injury was done by engines and cars, is sufficient after verdict. *Louisville, N. A. & C. R. Co. v. Harrington*, xix. 606.

Complaint for injury to crops averred that company had failed to erect fences where road passed through inclosed or uninclosed land. *Held*, that this negated possibility of animals having entered at highway crossing, and that in such action it was unnecessary to negative such possibility. *Chicago, R. I. & P. R. Co. v. Clare*, xix. 621.

In complaint against company for killing animals while operating road of another company, it is unnecessary to allege in what name road was being operated. *Cincinnati H. & D. R. Co. v. Leviston*, xix. 633.

Petition averred that hog was killed at point where there was no lawful fence, and that damage was caused by failure of company to erect fence. *Held*, that this was sufficient to show that hog came on track by reason of failure to fence, and was good after verdict. *Hannibal & St. Jo R. Co. v. Morris*, xix. 606.

## **PRACTICE.**

Act authorizing appraisement of value of cattle killed by railroad, and making such appraisement final upon company unless amount thereof is paid within certain time, *held* to be unconstitutional as taking from company right of trial by jury. *Graves v. Northern Pacific R. Co.*, xix. 436.

Notice and affidavit of killing of stock may be served on officer or agent of company by delivery without reading them. *Brentner v. Chicago, M. & St. P. R. Co.*, xix. 448.

Summons and complaint may be served on "depot agent" without affidavit required in other actions against corporations when service is upon persons other than officers. *East Tenn., Va. & Ga. R. Co. v. Baylis*, xix. 480.

When claim for damages for killing of cattle is presented within six months of injury, it is not necessary to bring suit within six months. *East Tenn., Va. & Ga. R. Co. v. Baylis*, xix. 480.



## **APPEALS—Continued.**

sustain verdict, bill of exceptions should contain certificate of facts proved, and not of the conflicting evidence adduced on the trial. *Fawcett v. Pittsburgh, C. & St. L. R. Co.*, xix. 1.

Order denying new trial is appealable, but court will look at record proper only. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

In considering refusal of court to enter judgment in arrest of verdict, court will examine only record proper, and will take no notice of docket entries or instructions to jury contained in diminution of record. *Northern Central R. Co. v. Mills*, xix. 160.

When charge of court consists of statement of issues and paragraphs numbered consecutively, an exception in these words, "and to the giving of such instructions as given at the time the defendant duly excepted," is sufficiently specific. *Hawes v. Burlington, C. R. & N. R. Co.*, xix. 220.

Determination of appellate court upon all questions of fact is decisive and will not be reviewed by Supreme Court of Illinois. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

Affirmance of judgment by appellate court in Illinois implies a finding of facts the same as found by trial court. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

Statutory provision authorizing ten per cent damages when Supreme Court is of opinion that appeal has been prosecuted for delay, does not apply to cases contested in good faith. *Chicago, B. & Q. R. Co. v. Dougherty*, xix. 292.

Question of granting new trial because of alleged misconduct of counsel is entirely within discretion of trial court, and this discretion will not be reviewed. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Objection to introduction of foreign statute in evidence on ground that it is not set out in pleadings must be made in trial court. It cannot be made on appeal. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 397.

When case was tried by both parties on theory that doctrine of comparative negligence was applicable and defendant asked instructions to that effect, such defendant cannot on appeal object to action of court in giving similar instructions on request of plaintiff. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 397.

Appellate court will not reverse because verdict is not sustained by the evidence. *Alabama Gt. S. R. Co. v. Powers*, xix. 502.

When material fact is established by competent and uncontradicted evidence, appellate court will not reverse because some incompetent evidence on the point was admitted. *Terre Haute & I. R. Co. v. Pierce*, xix. 581.

When petition states no cause of action, judgment for plaintiff will be reversed, though no exception was taken in court below. *St. Louis, Iron Mt. & S. R. Co. v. Nance*, xix. 594.

Bill of exceptions is not part of record until filed; and, unless transcript shows filing of bill, it will not be considered by Supreme Court as part of record. *Louisville, N. A. & C. R. Co. v. Harrigan*, xix. 596.

When bill of exceptions does not appear to have been filed, appellate court will not reverse for instructions given unless they state law incorrectly, and will not reverse for refusal to give instructions stating law correctly. *Louisville, N. A. & C. R. Co. v. Harrigan*, xix. 596.

Refusal to strike out part of complaint is harmless error. *Louisville, N. A. & C. R. Co. v. Harrigan*, xix. 596.

Admission of evidence by court below will only be reviewed on appeal when specific objection has been taken. *Wabash, St. L. & P. R. Co. v. Tretta*, xix. 601.

Bill of exceptions in court to which venue is changed will not save exception taken in court from which venue is changed, though same judge presides. *Cincinnati, H. & D. R. Co. v. Leviston*, xix. 633.

Reference in transcript for documents to bill of exceptions not in existence until after ruling concerning documents, is not sufficient. *Cincinnati, H. & D. R. Co. v. Leviston*, xix. 633.

**APPEALS—Continued.**

Exception to several refusals to charge must be specific as to each refusal. *Pound v. Port Huron & S. W. R. Co.*, xix. 640.

When it is manifest that appellant has not been injured, court will not reverse for erroneous instructions. *Hannibal & St. Jo R. Co. v. Morris*, xix. 666.

**ASSIGNMENT.**

See ASSIGNEES.

Action may be maintained in Iowa on assigned claim for personal injuries caused by negligence, though assignment is void by laws of State where it was executed and delivered. *Vimont v. Chicago & N. W. R. Co.*, xix. 213.

Action for tort is assignable so as to vest right of action in assignee. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

Party assigned claim for personal injuries. The assignee was to pay attorney's fee and costs of prosecuting suit, and was to pay amount recovered to assignor, except a small sum which he was to retain. *Held*, that defendant could not set up that assignment was void for champerty or maintenance. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

Even if assignment of claim is colorable and fraudulent, assignor need not be made party to action. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

When assignment of claim is legal and valid, fact that intent is to take from other party right to remove cause to U. S. courts does not give such party such right to remove. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

**ASSIGNEES.**

See ASSIGNMENT.

When in action against railroad company same is liable, fact that assignees of road who are citizens of different States from plaintiff voluntarily become parties defendant does not entitle them to remove cause to United States courts. *Gudger v. Western N. C. R. Co.* xix. 144.

**BACKING CARS.**

Plaintiff was injured at night while attempting to cross railroad-track in front of three gravel-cars pushed by engine. Cars were going at reasonable rate of speed, signals were given, headlight was perfect, and brakeman with lantern was stationed on rear car. *Held*, that railroad company was not guilty of negligence. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

All parties on train in above case testified that signal was given and lantern displayed on rear car. Other parties testified that they did not see the lantern or hear the signal. *Held*, that there was no evidence to go to the jury. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

It is for jury to say whether there is any less dangerous mode of running cars across a street than "kicking" them, which is equally proper and convenient. *Howard v. St. Paul, M. & M. R. Co.*, xix. 288.

**BELLS.**

See SIGNALS.

**CABLE ENGINE.**

Action will lie to abate nuisance caused by operation of steam-engine to work cable for propelling street-cars under license from municipality. *Tuebner v. California Street R. Co.*, xix. 147.

**CATTLE.**

See ANIMALS; FENCES.

**CATTLE-GUARDS.**

See ANIMALS; FENCES.



## **CHAMPERTY.**

Party assigned claim for personal injuries. Assignee was to pay attorney's fee and cost of prosecuting suit, and was to pay over to assignor amount recovered less a small sum for his trouble. *Held*, that defendant could not set up that assignment was void for champerty or maintenance. *Vimont v. Chicago & N. W. R. Co.*, xix. 315.

## **CHILDREN.**

### **See PARENT AND CHILD.**

Child of sixteen months left by parents in charge of boy of seven years of age crawled through hole in fence, as it had done once before, and got upon railroad-track, where it was killed. *Held*, that parents were not as matter of law guilty of contributory negligence, but that question was for jury. *Hoppe, Adm'r. v. Chicago, M. & St. Paul R. Co.*, xix. 74.

Company held liable for failure of engineer to slacken speed upon perceiving a child ahead on the track which he mistook for log of wood, in consequence of which child was run over and killed. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

In action for negligently running over child on track it may be shown that company failed to fence its road as required by statute. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

Whether or not parents are guilty of contributory negligence in allowing child to stray on track is generally for jury. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

Whether or not under facts of this case driver of street-car was negligent in running over child in street was for jury. *Dahl, Adm'r. v. Milwaukee City R. Co.*, xix. 121.

Whether or not mother of young child was guilty of contributory negligence in leaving it in charge of brother of thirteen years from whose custody it escaped and was killed by a street-car was for jury. *Dahl, Adm'r. v. Milwaukee City R. Co.*, xix. 121.

In action for injury to child by railroad turn-table where issue is lack of care in guarding it, company may prove that fastenings used were similar to those generally employed, and may also prove by expert that it would not be practicable to lock or fence turn-table. *Kolsti v. Minneapolis & St. L. R. Co.*, xix. 140.

When child released claim for damages in consideration of sum of money, charge that he could not recover if he had the money in his possession or under his control, is not erroneous. *Hawes v. Burlington, C. R. & N. R. Co.*, xix. 220.

When child was run over by street-car at crossing, *held*, that there could be no recovery unless it was proved that accident was occasioned by want of ordinary care on part of driver. *Roller v. Sutter Street R. Co.*, xix. 333.

When child escaped into street and was run over and killed by street-car at crossing, *held*, that whether or not its parents took proper precautions for its safety was for the jury. *Roller v. Sutter Street R. Co.*, xix. 333.

## **CITIES.**

### **See MUNICIPALITY.**

## **CONSTITUTIONAL LAW.**

United States Rev. Sta., § 5263, does not deprive States of power to regulate erection of telegraph-wires. *Banks v. Highland St. R. Co.*, xix. 139.

Act authorizing appraisement of value of cattle killed by railroad and making such appraisement final upon company unless amount thereof is paid within certain time, *held*, unconstitutional as taking from the company its right of trial by jury. *Graves v. Northern Pacific R. Co.*, xix. 486.

Clause in Kansas act ceding to United States the Fort Leavenworth Military Reservation, whereby the State reserves certain rights and jurisdiction, is valid. The Kansas law as to fencing railroads is therefore operative within the Reservation. *Chicago, R. I. & P. R. Co. v. McGlinn*, xix. 523.

Law requiring railroad companies to fence their tracks is constitutional. *Chicago, M. & St. Paul R. Co. v. Dumsier*, xix. 545.



also that the deceased was not guilty of contributory negligence. *Held*, that the case had been fairly submitted and that court would not disturb verdict. *Pearl v. Grand Trunk R. Co.*, xix. 239.

In action for running over horse and buggy at crossing it is error to charge that company is bound to full measure of care and diligence—all that could be expected. Company is bound only to ordinary, not extraordinary, care. *Western & Atlantic R. R. Co. v. King*, xix. 255.

It is error to charge jury that if law provides that train shall run at certain speed and it runs at higher rate, this is negligence. Question of negligence is solely for jury. *Western & Atlantic R. R. Co. v. King*, xix. 255.

Company liable for injury at crossing of main track occasioned by negligence of flagman who has undertaken to watch the main track, although not employed by the company for that purpose. *Peck v. Michigan Central R. Co.*, xix. 267.

In the present case of an injury at a street crossing, the question of defendant's negligence was properly left to the jury. *Maryland Central R. Co. v. Newbern*, xix. 261.

In absence of statutory requirement, railroad company is not bound to post flagman at crossing of country road. *Maryland Central R. Co. v. Newbern*, xix. 261.

It is not negligence for railroad company in open country to run its trains over public crossing at rate of thirty miles an hour. *Reading & Columbia R. Co. v. Ritchie et al.*, xix. 267.

Plaintiff was injured in sight while attempting to cross railroad-track in front of three gravel-cars pushed by engine. Cars were going at reasonable rate of speed, signals were given, headlight was perfect, and brakeman with lantern was stationed on rear car. *Held*, that the railroad company was not guilty of negligence. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

The engineer, conductor, fireman, and brakeman all testified in above case that signal was given and lantern displayed on rear car. Other parties testified that they did not hear the signal or see the lantern. *Held*, that latter evidence did not constitute more than a scintilla of evidence, and could not be submitted to jury. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

Whether rate of speed at which train is run across street is reasonable or not is for jury. *Howard v. St. Paul, M. & M. R. Co.*, xix. 283.

It is for jury to say whether there is any less dangerous mode of running cars across a street than "kicking" them, which is equally proper and convenient. *Howard v. St. Paul, M. & M. R. Co.*, xix. 283.

Whether railroad company is guilty of negligence in making running switch at street crossing in populous village or town is for jury. *Ferguson v. Wisconsin Central R. Co.*, xix. 285.

When engine gives statutory signal on approaching railroad crossing and keeps up same until crossing is passed, railroad company has discharged its full duty. Engineer is not bound to give such signals as will enable parties using crossing to ascertain approach of train and avoid injury. *Chicago, B. & Q. R. Co. v. Dougherty*, xix. 292.

Question being whether signals were given on approaching railroad-crossing, evidence that signals were not given at similar crossing three miles distant was admissible. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

To run train across street in village where view of track is obstructed, at high speed and without giving signals, is negligence, although signals are not required by statute. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Company is not liable for running over drunken man at crossing with detached train running down grade when party put himself in dangerous position, and servants, though keeping proper lookout, did not see him until it was too late to avoid injuring him. *Kean v. Baltimore & Ohio R. Co.*, xix. 321.

When servants on detached train of railroad company running down grade, after becoming aware of dangerous position of drunken man at crossing, had time to take precautions to avoid injury to him but failed to take such precautions, the company was held to be liable for such injury. *Kean v. Baltimore & Ohio R. Co.*, xix. 321.



**CROSSINGS—Continued.**

prevented him from seeing car. *Held*, that question of contributory negligence was for the jury. *Ferguson v. Wisconsin Central R. Co. et al.*, xix. 285.

Two boys were driving down hill towards crossing at point where view of track was partially obstructed. At some distance from track, driver pulled up his horse and proceeded slowly. His attention was then diverted by other boy to distant object. When within from 10 to 46 feet from crossing he first saw approaching train, bell of which had been rung. He whipped up and attempted to cross, but wagon was struck. *Held*, that question of contributory negligence was for the jury. *Tyler v. New York & N. E. R. Co.*, xix. 296.

Wagon was struck at highway crossing near village by detached locomotive running at great speed. Evidence was doubtful as to whether locomotive could be seen in deep cut close at hand, and whether signals were given. There was also evidence that driver could not safely stop team or turn it into side road. *Held*, that it was not a proper case for a nonsuit, but that question of contributory negligence was for jury. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

Person approaching crossing who has reason to suppose that train has recently passed from one direction is not guilty of negligence if he fails to look in that direction, particularly if view was obstructed. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

Instruction that it was duty of person approaching crossing to look up track, if by so doing he could have ascertained approach of train at sufficient distance to have avoided it, is proper. The question what was such sufficient distance was properly left to the jury. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

Plaintiff drove towards track view of which was partially obstructed. His attention was naturally drawn to track in one direction, and he had reason to suppose that no train was coming in the other direction. Immediately before he came to track he first became aware of train approaching in unexpected direction at high rate of speed and without giving signals. He could not turn team, and attempted to cross track, but was struck. *Held*, that question of contributory negligence was for jury. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Person approaching railroad-crossing with view obstructed has right to presume that engineer of train approaching at high rate of speed will give signals, and may regulate his conduct accordingly. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

In proceeding by State against railroad company to recover penalty for killing person at railroad crossing, said proceeding being instituted for benefit of family of deceased, burden is upon prosecutor to show that there was no contributory negligence. *State of Maine v. Maine Central R. Co.*, xix. 312.

Person undertaking to cross railroad track at moment when train of cars is so near that he is liable to be and is in fact struck, is *prima facie* guilty of contributory negligence. *State of Maine v. Maine Central R. Co.*, xix. 312.

Person approaching railroad crossing in city at point where view was obstructed attempted to cross track holding umbrella over his head and shoulders, without stopping, looking or listening. He was struck and killed by a passing train running at unlawful rate of speed. *Held*, that he was guilty of such contributory negligence as to preclude recovery. *Pennsylvania R. R. Co. v. State to use, etc.*, xix. 326.

When child escaped into street and was run over and killed by street-car at crossing, *held*, that whether or not its parents took proper precautions for its safety was for jury. *Roller v. Sutter Street R. R. Co.*, xix. 333.

Plaintiff in attempting to cross tracks of company stepped out from behind cars on one track which obstructed view so as to face engine approaching on second track. She was struck by this and injured. *Held*, that she was guilty of contributory negligence which precluded recovery. *Pzolla v. Michigan Central R. Co.*, xix. 334.

Person drove towards crossing with which he was familiar at a time he knew train was due. View of track was obstructed until he got within short distance thereof. There was no evidence that he stopped and looked when within that distance, and although flagman motioned and called to him to stop he merely slackened his speed. He was struck and injured by express train running at high









**DAMAGES—Continued.**

unless same was occasioned by gross negligence. *Gulf, C. & S. F. R. Co. v. Levy*, xix. 151.

In action for personal injuries, damages may be recovered for such future consequences as are reasonably certain to follow the injury, but not for such as are contingent or merely possible. *New York, L. E. & W. R. Co. v. Strohm*, xix. 167.

When plaintiff, in consequence of injury, was forced to have half of one foot amputated, was disabled for thirteen months, and incurred surgeon's bill of over \$1000, *held*, that verdict for \$8000 was not excessive. *Ferguson v. Wisconsin Central R. Co.*, xix. 285.

Party detained at crossing by cars standing a longer time than statute allows, may recover from company for expenses incurred by reason of his being too late to take a certain train which he had intended to take. *Patterson v. Detroit, L. & N. R. Co.*, xix. 415.

When, in consequence of failure of company to make cattle-guards, crop is injured, owner may recover for injury, and also for expense incurred in attempting to protect crops and prevent further injury. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

**DEATH.**

Damages of \$1000 for killing of healthy boy of poor parents about 16 months old, *held* not excessive. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

In action for negligently causing the death of a party, no allowance is made for distress of mind. *Market St. R. R. Co. v. McKeever*, xix. 123.

The damages recoverable are what the deceased would have probably earned by his calling during the remainder of his life, taking into account his age, habits, and ability to labor. *Market St. R. R. Co. v. McKeever*, xix. 123.

Measure of damages is reasonable expectation of pecuniary benefit from continuance of life of deceased, taking into account its probable duration. *Scheffler, Adm'r, v. Minneapolis & St. L. R. Co.*, xix. 173.

Carlisle Tables are admissible in evidence to prove probable duration of life. *Scheffler, Adm'r, v. Minneapolis & St. L. R. Co.*, xix. 173.

In Iowa, administrator may be appointed to recover damages for death caused by negligence, in another State. *Morris, Adm'r, v. Chicago, R. I. & P. R. Co.*, xix. 180.

Administrator appointed in a State may maintain action in courts of that State for death caused by negligence of railroad company in another State. *Morris, Adm'r, v. Chicago, R. I. & P. R. Co.*, xix. 180.

Right of action for death given by statutes of one State may be enforced in another whose statutes are substantially similar. *Morris, Adm'r, v. Chicago, R. I. & P. R. Co.*, xix. 180.

Administrator appointed in another State cannot maintain action for causing death when laws of State whence he derives appointment give him no power to maintain such action in that State. *Limekiller, Adm'r, etc., v. Hannibal & St. J. R. Co.*, xix. 184.

In action for death of child too young to earn anything or render services to parents, value of probable future services to parents during minority is measure of damages and may be estimated by a jury without evidence. *Little Rock & Ft. S. R. Co. v. Barker et ux.*, xix. 195.

Though jury is not restrained by law as to damages for injuries caused by death, court will set aside any grossly excessive verdict. *Little Rock & Ft. S. Ry. Co. v. Barker et ux.*, xix. 195.

In proceeding by State against railroad company to recover penalty for killing person at railroad crossing, said proceeding being instituted for benefit of family of deceased, burden is upon prosecutor to show that there was no contributory negligence. *State of Maine v. Maine Central R. Co.*, xix. 312.

In proceeding against railroad company by indictment to recover penalty for killing person at crossing, amount of forfeiture between maximum and minimum fixed by statute is for jury. *State of Maine v. Maine Central R. Co.*, xix. 312.

**DEAF PERSONS.**

Engineer seeing party ahead on track may ordinarily presume that he will step off in time to avoid injury, but if he knows the party to be deaf he must use proper precautions to prevent injury to him. *International & Gt. W. R. Co. v. Smith*, xix. 21.

**DECLARATIONS.**

When duty of engineer is to inform switchman of obstructions on track, declarations made by him to switchman to the effect that he had killed a man, thus accounting for an obstruction, are admissible. But declarations made as to the circumstances of the killing are not admissible, because not made within the line of his duty. *Baltimore & Ohio R. Co. v. State* to use, xix. 88.

Declarations of deaf mute constituting narrative of accident causing his death, made about half an hour after occurrence of accident, are not admissible in evidence as part of the *res gestae*. *Waldele v. New York Central & H. R. R. Co.*, xix. 400.

**DOCTORS.**

See **PHYSICIANS.**

**DOOR.**

In action for injury by falling of door of freight-car on plaintiff, who was walking in street below, proof of accident raises no presumption of negligence. Previous knowledge of company of defect or existence of defect for such a time that knowledge may be inferred must be proved by plaintiff. *Case v. Chicago, R. I. & P. R. Co.*, xix. 142.

**DRUNKEN PERSONS.**

Company is not liable for running over drunken man at crossing with detached train running down grade when party put himself in dangerous position, and servants, though keeping proper lookout, did not see him until it was too late to avoid injuring him. *Kean v. Baltimore & Ohio R. Co.*, xix. 321.

When servants on detached train of railroad company running down track, after becoming aware of dangerous position of drunken man at crossing, had time to take precautions to avoid injuring him but failed to take such precautions, the company was held to be liable for such injury. *Kean v. Baltimore & Ohio R. Co.*, xix. 321.

**DUMMY.**

See **STEAM DUMMY.**

**ERRORS AND APPEALS.**

See **APPEALS.**

**EVIDENCE.**

See **EXPERTS.**

When objection to introduction of evidence is overruled and no exception taken, appellate court will view the objection as waived. *Fawcett v. Pittsburgh, C. & St. L. R. Co.*, xix. 1.

Non-expert witness may testify as to his estimate of rate of speed of train. but the evidence is of an unsatisfactory nature. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

When duty of engineer is to inform switchman of obstructions on track, declarations made by him to switchman to the effect that he had killed a man, thus accounting for an obstruction, are admissible. But declarations made as to the circumstances of the killing are inadmissible, because not made within the line of his duty. *Baltimore & Ohio R. Co. v. State* to use, xix. 88.

**EVIDENCE—Continued.**

It may be presumed that a witness follows directions given him by the court. *Johnson v. Central Vt. R. Co.*, xix. 169.

In action for personal injuries, extract from paper signed by plaintiff's attending physician, tending to contradict his subsequent testimony, may be read to jury, the paper being excluded. The fact that paper is also signed by physician in employ of defendant is immaterial. *Smith v. Metropolitan R. Co.*, xix. 171.

Carlisle tables are admissible in evidence to prove probable duration of life. *Scheffler v. Minneapolis & St. L. R. Co.*, xix. 173.

Plaintiff cannot call witness to prove that in his opinion certain excavation or trench was dangerous. But if defendant on cross-examination elicits opinion that same was not dangerous according to defendant's theory of its condition, plaintiff may ask on redirect examination for his opinion as to whether it was dangerous if in the condition alleged by plaintiff. *Street R. R. Co. v. Nolthe-nius*, xix. 191.

Judgment against municipality in action to recover for injury caused by defect in street which railroad company is bound to keep in repair is conclusive as against such company when notice has been given company to appear, and defend. Such judgment and notice may be put in evidence in action by municipality against company to recover amount paid out. *Western & Atlantic R. R. Co. v. Atlanta*, xix. 233.

Improper rejection of competent testimony is cured by subsequent admission thereof. *Ferguson v. Wisconsin Central R. Co.*, xix. 285.

Question being whether certain signals were given on approaching railroad-crossing, evidence that signals were not given at similar crossing three miles distant was admissible. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

Farmer of many years' experience is competent to testify as to value of his own labor. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

When person is killed at railway-crossing and there is no witness of accident, evidence of general character of deceased for carefulness is not admissible to negative contributory negligence. *Chase v. Maine Central R. Co.*, xix. 356.

Ordinance of incorporated city of another State may be proved by sworn copy. Deposition of city clerk at time of passage of such ordinance to effect that exhibit was true copy *held* sufficient to allow exhibit to be admitted in evidence. *Louisville, N. A. & E. R. Co. v. Shires, Adm'r*, xix. 387.

When witness in deposition testifies to passage of ordinance by city council and general objection only is made, and no motion is made to suppress deposition, objection cannot be made on trial that passage of ordinance can only be shown by record and not by parol. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

When it is desired to put ordinance in evidence, written proof of incorporation of city is not necessary. Statute authorizing incorporation may be read and followed by evidence of passage of ordinance and other corporate acts. This constitutes sufficient *prima facie* proof of incorporation. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

It is error for court to charge that jury should give greater weight to affirmative evidence that signals were given than to negative evidence to effect that they were not, or that parties did not hear them. *Louisville, etc., R. Co. v. Shires, Adm'r*, xix. 387.

It is error to instruct jury that greater weight should be given to testimony of witnesses stating that signals were not given than to that of witnesses stating that they were. The rule would seem to be the other way. *Chicago & Alton R. Co. v. Robinson*, xix. 397.

Declarations of deaf mute constituting narrative of accident causing his death, made about half an hour after occurrence of accident, are not admissible as part of the *res gestae*. *Waldele v. New York Central & H. R. R. Co.*, xix. 400.

When answer is not strictly responsive to question, though apparently suggested by it, opponent may move to strike out answer, though he has not objected to question. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

Witness is incompetent to testify as to space within which he has observed





**EXPERTS—Continued.**

his opinion as to rate of speed at which train was going at certain time. *ville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

Witnesses cannot express opinion whether railroad could properly be at certain point. *Indiana, B. & W. R. Co. v. Hale*, xix. 502.

Expert evidence is not admissible upon question whether cattle-guards sufficient. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

**FENCES.****See ANIMALS.****GENERAL PRINCIPLES AS TO FENCE LAWS.**

In action for negligently running over child on track, it may be a company failed to fence its road as required by statute. *Keyser v. S. T. R. Co.*, xix. 91.

Company is only liable for injury to animals occasioned by defect when animals were at time running at large. *Brentner v. Chicago, & N. W. R. Co.*, xix. 448.

When animals are killed on track, presumption is that company was at fault and burden of proof is on company to show that it constructed good fences. *Brentner v. Chicago, M. & St. P. R. Co.*, xix. 448.

When animal is killed by railroad train within corporate limits of town where company is bound to fence but failed to do so, negligence proved. *Hannibal & St. Jo. R. Co. v. Young*, xix. 512.

Company had fenced track on both sides, but had opened gap on its own convenience. Animal was killed while trying to escape it. *Held*, that whether servants on train were guilty of negligence or not. *Tyler v. Illinois Central R. Co.*, xix. 519.

Kansas fence law is operative within boundaries of Fort Leavenworth Reservation. *Chicago, R. I. & P. R. Co. v. McGinn*, xix. 522.

When animals are killed by railroad train in consequence of failure of company to erect statutory fence, it is liable irrespective of species of animal. Statute applies to killing of swine or sheep. *Halverson v. Minn. R. Co.*, xix. 526.

Fence laws are constitutional. In what manner and to what extent must be erected lies within legislative discretion. *Chicago, M. & St. P. R. Co. v. Dummer*, xix. 545.

When evidence fails to show that cattle strayed on track at place where company was bound to fence and failed to do so, there can be no recovery. *Green Bay, S. P. & N. R. Co.*, xix. 575.

In action for killing stock, material question is as to fence whether animals entered upon track. *Wabash, St. L. & P. R. Co. v. Truitt*, xix. 575.

Company is not liable for injury to cattle caused by failure to erect fence, unless the animal was actually touched by engine or train. *ville, N. A. & C. R. Co.*, xix. 608.

Company leasing road is bound to maintain cattle-guards on road straying upon improved land. *Missouri Pacific R. Co. v. Morrill*, xix. 619.

In complaint against company for killing animals while on road of another company, it is unnecessary to allege in what name road was used. *Cincinnati, H. & D. R. Co. v. Leviston*, xix. 638.

Company is liable for injury done to crops by failure to fence, even if fact that road was at time in hands of contractor who had no fence. *Pound v. Port Huron & S. W. R. Co.*, xix. 640.

Company is liable for injury to animals caused by failure to erect cattle-guards at reasonable time, even before trains begin to run. *Silver v. Kans. C. R. Co.*, xix. 642.

Liability of company to build fences on both sides of road is not affected by contract with another party to erect such fences. *Silver v. L. & G. R. Co.*, xix. 642.

In Canada, railroad company is not liable for killing horse

**FENCES—Continued.**

by failure to fence. It is liable only to the "proprietor or tenant" of adjoining land. *Conway v. Canada Pacific R. Co.*, xix. 650.

Obligation to construct fences is not limited to protection and benefit of owner and occupier of abutting land. *Pittsburgh, C. & St. L. R. Co. v. Allen*, xix. 657.

**SUFFICIENCY OF FENCES.**

Construction of wire fence held to be sufficient compliance with fence laws of Minnesota. *Halverson v. Minneapolis & St. L. R. Co.*, xix. 526.

Company is only bound to erect fence reasonably sufficient to prevent livestock coming upon track. *Shellabarger v. Chicago, R. I. & P. R. Co.*, xix. 527.

In Michigan, company may place gates and bars in fence wherever it deems it advisable. *Hayt v. Detroit, G. H. & M. R. Co.*, xix. 627.

**WHERE FENCES MUST BE BUILT AND WHERE THEY NEED NOT BE.**

Company is not excused from erecting statutory fence unless paramount interest of public intervenes or there is paramount duty by company to public. No private interest or convenience either of individuals or of the company, will excuse the erection of a fence. *Atchison, T. & S. F. R. Co., v. Shaft*, xix. 529.

A railroad company is bound to fence a portion of its station grounds not

**FENCES—Continued.**

Burden is on plaintiff to show that road was not fenced at point where animal came on track. Company is then bound to show that it was not bound to fence there. *Lake Erie & W. R. Co. v. Kneadle*, xix. 568.

Company is not excused from fencing because way alongside of track is in use and necessary to reach stock-lots and cattle-chutes. *Banister v. Pennsylvania Co.*, xix. 570.

When highway runs parallel with railroad, company is bound to fence when it passes through inclosed fields or uninclosed land. *Hannibal & St. Jo R. Co. v. Rozzelle*, xix. 591.

Company is bound to fence its track except at points where a fence would impair use of private property or rights of public. *Wabash, St. L. & P. R. Co. v. Tretts*, xix. 601.

Railroad company is not bound to fence track when by so doing it would exclude private proprietors from passage to highway. *Croy v. Louisville, N. A. & C. R. Co.*, xix. 608.

In action for killing of animal by reason of want of fence, burden is on company to prove that road could not have been fenced at the point. *Louisville, N. A. & C. R. Co. v. Clark*, xix. 628.

When evidence shows that cattle were killed at point not a public crossing, jury may presume that company was bound to fence there. *Schlegener v. Chicago, M. & St. P. R. Co.*, xix. 625.

One company sold part of right of way to another company, who constructed parallel track. The purchasing company contracted with adjoining owner to fence. Said fence was insufficient, and cattle of stranger escaped on track of the first company and were killed. *Held*, that the said company was liable. *Pittsburgh, C. & St. L. R. Co. v. Allen*, xix. 657.

Company is bound to fence where public highway runs along and adjoining track. *Hannibal & St. Jo R. Co. v. Morris*, xix. 666.

Company is bound to fence where county road runs parallel with and adjoining right of way through uninclosed prairie land. *Hannibal & St. Jo R. Co. v. Rutledge*, xix. 669.

**CATTLE-GUARDS.**

Cattle-guards must be put in at crossings of public highways and other public places so as to "inclose" the track. *Atchison, T. & S. F. R. Co. v. Shaft*, xix. 529.

In Minnesota, company is bound to make cattle-guards at wagon-crossings in towns and cities as well as in country. *Greeley v. St. Paul, M. & M. R. Co.*, xix. 559.

Company is bound to put in and maintain cattle-guards at intersecting highways. *Wabash, St. L. & P. R. Co. v. Tretts*, xix. 601.

Damages are recoverable for injuries to crop caused by animals straying on account of failure of company to make cattle-guards. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

When, in consequence of failure of company to make cattle-guards, public got into plaintiff's field and his grass and corn-stalks were destroyed, *held*, that he was entitled to damages from the company. *Raridon v. Central Iowa R. Co.*, xix. 615.

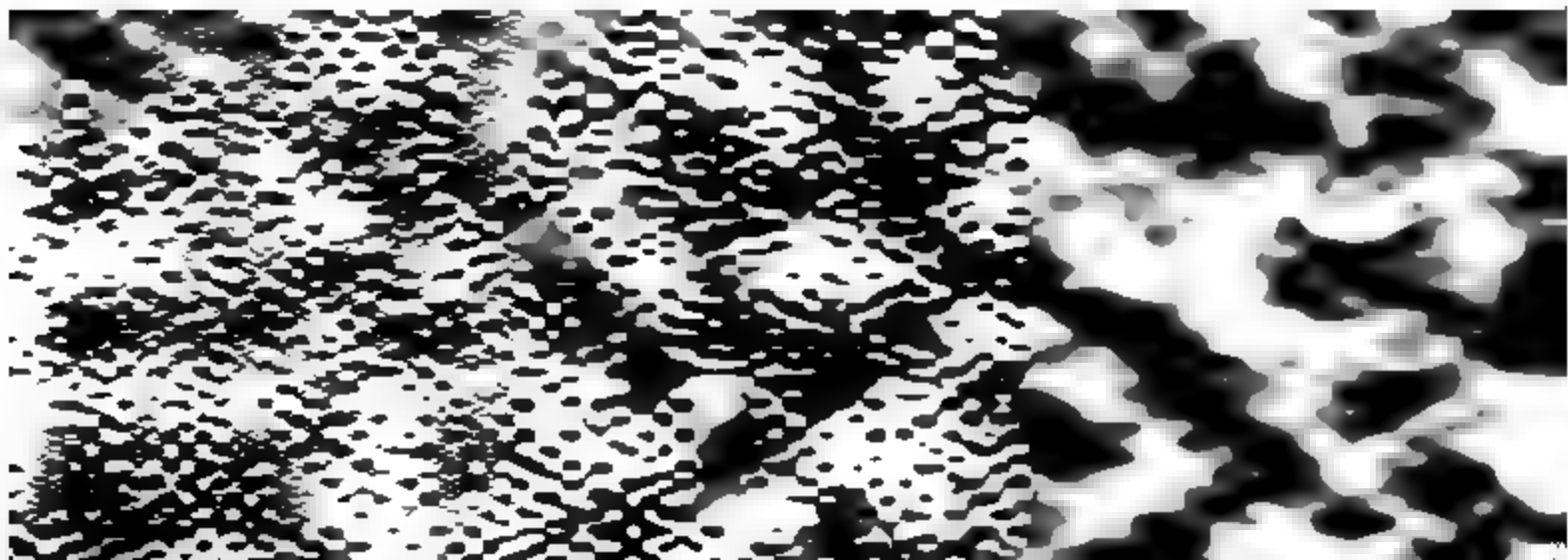
Company not liable for injury to crops occasioned by failure to repair cattle-guard which it constructed originally at request of land-owner and has kept for thirty years in repair. *Vicksburg & M. R. Co. v. Dixon*, xix. 617.

Company must see that proper cattle-guards are maintained to prevent cattle straying into fields and injuring crops. *Missouri Pacific R. Co. v. Morrow*, xix. 680.

**REPAIRS.**

When company uses diligent effort to maintain fences, but strangers throw them down, company is not liable for injuries to cattle occasioned in consequence. *Missouri Pacific R. Co. v. Walthers*, xix. 662.

When there is no fence, rule does not apply giving company reasonable





**FENCES—Continued.**

where company was bound to fence but had failed to do so. *Held*, that this negated by implication that cattle came on track at crossing or at point within limits of incorporated city or town. *Missouri Pac. R. Co. v. Wade*, xix. 586.

In action for killing cattle, complaint averred that they came on track and were killed at point on same where it passes through uninclosed land, and not at crossing. *Held*, that this sufficiently negated possibility that killing occurred at station or within limits of unincorporated city or town. *Missouri Pac. R. Co. v. Wade*, xix. 586.

In action for killing plaintiff's hogs, the complaint must state that hogs came on track at point where defendant was bound by law to fence but failed to do so. *St. Louis, I. Mt. & S. R. Co. v. Asher*, xix. 593; *St. Louis, I. Mt. & S. R. Co. v. Nance*, xix. 594.

Complaint merely stated that cattle came on track at point where company was required by law to fence and could have fenced. *Held*, that as it failed to aver that track was not fenced, it was insufficient. *Louisville, N. A. & C. R. Co. v. Quade*, xix. 595.

When complaint is otherwise sufficient it need not state that road could have been fenced at point where stock entered upon it. *Louisville, N. A. & C. R. Co. v. Hall*, xix. 597.

Complaint averring that road was not fenced at place where animals got on track and at place where they were killed, is sufficiently definite. *Louisville, N. A. & C. R. Co. v. Harrigan*, xix. 598.

In action before justice of peace for killing cattle, complaint is not bad for failing to aver that road was not fenced where cattle entered upon it. *Louisville, N. A. & C. R. Co. v. Argenbright*, xix. 604.

Complaint averring that animal strayed on track at point where road was not fenced, and that defendant "ran against and over said mare and killed her," not showing that injury was done by engines and cars, is sufficient after verdict. *Louisville, N. A. & C. R. Co. v. Harrington*, xix. 606.

Complaint for injury to crops averred that company had failed to erect fences where road passed through inclosed or uninclosed land. *Held*, that this negated possibility of animals having entered at highway crossing, and that in such action it was unnecessary to negative such possibility. *Chicago, R. I. & P. R. Co. v. Clark*, xix. 621.

Petition averred that hog was killed at point where there was no lawful fence, and damage was caused by failure of company to erect fence. *Held*, that this was sufficient to show that hog came on track by reason of failure to fence, and was good after verdict. *Hannibal & St. Jo R. Co. v. Morris*, xix. 666.

**PRACTICE.**

In action for killing cattle caused by failure to fence, action must be brought in county where accident occurred. When action is also on ground of negligence, appellate court will presume that finding was such as to support jurisdiction. *Terre Haute & I. R. Co. v. Pierce*, xix. 581.

Under circumstances of this case jury was warranted in presuming that accident occurred in township where suit was brought. *Missouri Pac. R. Co. v. Wade*, xix. 586.

Action for injury to cattle caused by lack of statutory fence must be brought in county where injury occurred. *Croy v. Louisville, N. A. & C. R. Co.*, xix. 608.

In action for killing of animal caused by failure to fence, service of notice on "station agent" is sufficient under Iowa code to entitle party to double damages. *Schlenger v. Chicago, M. & St. P. R. Co.*, xix. 625.

**EVIDENCE.**

Witnesses cannot state opinion as to whether road is sufficiently fenced at certain point. *Indiana, B. & W. R. Co. v. Hale*, xix. 562.

**FENCES—Continued.**

Expert evidence is not admissible upon question whether cattle-guards are sufficient. *St. Louis & S. F. R. Co. v. Ritz*, xix. 611.

Evidence to show condition of fence at point where stock was killed, and also furnishing reasonable inference that stock came on track at that point, is admissible. First point may, within discretion of court, be proved before second. *Missouri Pacific R. Co. v. Walthers*, xix. 662.

**SET-OFF.**

When complaint in action for killing cattle sets up failure to fence and negligent killing, company cannot set off the injury done to train by throwing it off the track. *Terre Haute & I. R. Co. v. Pierce*, xix. 581.

**FLAGMEN.**

Company liable for injury at crossing of main track occasioned by negligence of flagman who undertakes to watch main track, though not employed by company for that purpose. *Peck v. Michigan Central R. Co.*, xix. 257.

In absence of statutory requirement, railroad company is not bound to post flagman at crossing of country road. *Maryland Central R. Co. v. Newbern*, xix. 261.

Absence of flagman at crossing does not exempt traveller from obligation to stop, look and listen. *Maryland Central R. Co. v. Newbern*, xix. 261.

When declaration does not aver that failure to have flagman at crossing amounted to wilful or wanton negligence, it is not error for the court to refuse an instruction on behalf of defendant that such failure did not amount to wilful or wanton negligence. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

**FLYING SWITCHES.**

Person came out of store near railroad, and after waiting for engine to pass attempted to cross the track. He was run over by detached car just uncoupled from engine to make flying or running switch. Smoke and steam of engine prevented him from seeing car. *Held*, that question of contributory negligence was for the jury. *Ferguson v. Wisconsin Central R. Co. et al.*, xix. 285.

Whether railroad company is guilty of negligence in making running switch at street crossing in populous village or town is for jury. *Ferguson v. Wisconsin Central R. Co.*, xix. 285.

Woman and child walking on railroad track commonly used by public as foot-path without objection on part of company, were struck and killed by train making flying switch at point where highway crossed track. *Held*, that the company owed no such duty to them as to travellers on said highway, and that they had been guilty of such contributory negligence as precluded recovery. *Grethen, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 342.

**FORT LEAVENWORTH MILITARY RESERVATION.**

SEE ANIMALS; CONSTITUTIONAL LAW; FENCES; UNITED STATES.

**FRAUD.**

Even if assignment of claim is colorable and fraudulent, assignor need not be made party to action. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

Release of claim for damages procured by agents of railroad company from passenger injured in railroad accident held to be void, because obtained through fraud and misrepresentation and when releasor was in great pain and under the influence of opiates. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

When release is procured by fraud from person in unfit condition to give it and money is paid on its execution, releasor may bring action without tendering back money paid or expressly rescinding release. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.



**FRIGHTENING HORSES.**

When party is driving along road towards railway and engineer on train fails to give statutory signals on approaching crossing, in consequence of which horses are frightened by train and injury ensues, the railroad company is liable. *Grand Trunk R. Co. v. Rosenberger*, xix. 8.

When train fails to give statutory signal on approaching crossing, and in consequence horses driven along highway parallel with railroad are frightened and injury ensues, the railroad company is liable. *Ransom v. Chicago, St. P., M. & O. R. Co.*, xix. 16.

When railroad company permits cars to stand so as to obstruct crossing for longer time than permitted by statute, and accident occurs in consequence by reason of horse becoming frightened at proximity of cars, company is responsible in damages to party injured. *Young v. Detroit, C. H. & M. R. Co.*, xix. 417.

When plaintiff attempted to drive across railroad crossing partly obstructed by standing cars, and his horse was frightened thereby and injury ensued, question of contributory negligence was properly left to the jury. *Young v. Detroit, C. H. & M. R. Co.*, xix. 417.

**HIGHWAYS.**

See **CROSSINGS; STREETS AND HIGHWAYS.**

**HORSE-CARS.**

See **STREET-CARS.**

**HORSES.**

See **ANIMALS; FENCES; FRIGHTENING HORSES.**

**HUSBAND AND WIFE.**

When husband and wife are joined in suit for damages to wife and no objection is made to joinder and judgment is given for plaintiff, same is a bar to any subsequent suit as much as though husband alone had been plaintiff. *San Antonio St. R. Co. v. Helm et ux.*, xix. 158.

In action by husband and wife for injuries to wife, it is error to include in claim for damages money expended to effect wife's cure. Right of action for this is in husband alone. *Northern Central Ry. Co. v. Mills*, xix. 160.

In above case the declaration contained but one count, including claim for money expended as above. A motion in arrest of judgment was overruled on ground that on trial no evidence was offered as to money so expended. *Held*, this action was proper. *Northern Central R. Co. v. Mills*, xix. 160.

**ICE AND SNOW.**

Street-car company held liable for injury occasioned by high heaps of snow and ice thrown upon either side of its tracks, which heaps it had failed to level or take away within a reasonable time. *Bowen v. Detroit City Street R. Co.*, xix. 181.

It was not necessary for plaintiff to aver in above case that obstructions were left in street for unreasonable time. Fact that the time during which they were left was not unreasonable was matter of defence. *Bowen v. Detroit City Street R. Co.*, xix. 181.

Train of railroad company unlawfully obstructed crossing. Plaintiff being unable to cross walked around rear of train, entered another street, and selecting one of several routes to her home, slipped and fell on certain ice deposited there by said company clearing its track. *Held*, that the obstruction could not be held to be the proximate cause of the injury, and that if the railroad company was not in fault for so placing the ice, it was not liable for the injury. *Pittsburgh, C. & St. L. R. Co. v. Staley*, xix. 381.

**INDICTMENT.**

In proceeding by railroad company against State to recover damages for killing person at crossing, burden of proof is on prosecutor to show that party was not guilty of contributory negligence. *State of Maine v. Maine Central R. Co.*, xix. 812.

In above case amount of forfeiture between maximum and minimum fixed by statute was for the jury. *State of Maine v. Maine Central R. Co.*, xix. 812.

Indictment for obstructing highway need only state that act was done unlawfully and without lawful authority. Words "knowingly and wilfully" are surplusage in indictment and need not be proved. *State of West Va. v. Chesapeake & Ohio R. R. Co.*, xix. 429.

On trial of indictment against railroad company for obstructing highway at crossing by raised track, defendant may show that road was at time in possession of and run by another company. *State of West Va. v. Chesapeake & O. R. R. Co.*, xix. 429.

On trial of indictment against railroad company for obstructing highway, it is error for court to charge jury that there was but one railroad in the county and that was the road of defendant. *State of West Va. v. Chesapeake & Ohio R. Co.*, xix. 429.

**INTEREST.**

Party recovering double damages for death of cattle is not entitled to interest on damages as part of verdict. *Brentner v. Chicago, M. & St. P. R. Co.*, xix. 448.

Plaintiff cannot recover interest on value of animal killed, besides double damages. *Missouri Pac. R. Co. v. Wade*, xix. 586.

**JUDGMENT.**

Judgment against municipality in action to recover damages for injury caused by defect in street which railroad company is bound to keep in repair, is conclusive against such company when notice has been given company to appear and defend. *Western & Atlantic R. Co. v. Atlanta*, xix. 288.

**JURISDICTION.**

See **REMOVAL OF CAUSES; UNITED STATES COURTS.**

When special judge elected in place of regular judge is disqualified in particular case, another special judge may be elected for that case. *Little Rock & Ft. S. R. Co. v. Barker et ux.*, xix. 195.

**JURY.**

Servant of railroad company cannot sit as juror in case to which company is party. *Burnett v. Burlington & M. R. Co.*, xix. 25.

When challenge to incompetent juror is overruled, and he is afterwards peremptorily challenged, and record does not show that peremptory challenges were exhausted, the error is without prejudice. *Burnett v. Burlington & M. R. Co.*, xix. 25.

Court cannot fill up panel of jury *de circumstantibus* when statute provides that in such case jurors must be drawn from body of county. *Brentner v. Chicago, M. & St. P. R. Co.*, xix. 448.

**LEASE.**

Company leasing road is bound to maintain cattle-guards to prevent cattle straying upon improved land. *Missouri Pacific R. Co. v. Morrow*, xix. 680.

**LIFE TABLES.**

Carlisle Tables are admissible in evidence to prove probable duration of life. *Scheffler v. Minneapolis & St. L. R. Co.*, xix. 178.

## **LIGHTS.**

Railroad company displaying light on rear car of backing train and observing other precautions *held* not to have been guilty of negligence. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

Company is not bound to have such brakes as will enable train to be stopped at night in time to avoid injury to cattle on track first discernible by headlight 75 yards ahead. Nor is it bound to run trains at such speed as will enable them to be stopped within such space. *Winston v. Raleigh & S. R. Co.*, xix. 516.

## **LIMITATIONS.**

When claim for damages for killing cattle is presented within six months, it is not necessary to bring suit within that time. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 490.

## **MAINTENANCE.**

Party assigned claim for personal injuries. Assignee was to pay attorney's fee and cost of prosecuting suit, and was to pay over to assignor amount recovered less a small sum for his trouble. *Held*, that defendant could not set up that assignment was void for champerty or maintenance. *Vimont v. Chicago & N. W. R. Co.*, xix. 315.

## **MARRIED WOMEN.**

See HUSBAND AND WIFE.

## **MASTER AND SERVANT.**

See SERVANT.

## **MINORS.**

See CHILDREN.

## **MUNICIPALITY.**

See ORDINANCE.

When municipality is held liable in damages for personal injuries caused by defect in street which railroad company has failed to keep in repair as bound by law to do, municipality may recover over from railroad company sum paid out on account of injury. *Western & Atlantic R. R. Co. v. Atlanta*, xix. 233.

When notice has been given to railroad company in such case of pending suit, judgment against municipality is conclusive against company, and same may with notice be put in evidence in suit by municipality against company to recover amount paid out. *Western & Atlantic R. R. Co. v. Atlanta*, xix. 233.

## **NEGLIGENCE.**

See ANIMALS; BACKING CARS; CABLE-ENGINE; CHILDREN; COUPLING CARS; CROSSINGS; DEAF PERSONS; DOOR; DRUNKEN PERSONS; EXCAVATIONS; FENCES; FLAGMEN; FLYING SWITCHES; FRIGHTENING HORSES; ICE AND SNOW; INDICTMENT; LIGHTS; NEGLIGENCE (Contributory); NEGLIGENCE (Comparative); OBSTRUCTING HIGHWAYS; PARENT AND CHILD; PROXIMATE AND REMOTE CAUSE; SIGNALS; SPEED; STAKE; STATIONS; STEAM-DUMMY; STREETS; STREET-CARS; TELEGRAPH; TRESPASSERS; TURN TABLES.

Railroad company ran cars on defective siding belonging to coal company. In consequence cars ran into river and sunk plaintiff's barge. *Held*, that the company was liable, as its negligence in using the track was the proximate cause of the accident. *Fawcett v. Pittsburgh, C. & St. L. R. Co.*, xix. 1.

Person walking along platform was injured by fall of overloaded truck. *Held*, that as no wilful negligence was charged, the party was bound to show that there was no contributory negligence on her part. *Louisville, N. A. & C. R. Co. v. Shanks*, xix. 28.

In an action to recover damages to a person on or near a railroad track for

## **NEGLECTANCE—Continued.**

injuries caused by a passing train, no presumption of negligence arises from occurrence of accident. The negligence must be proved. *Phila., W. & B. R. Co. v. Stebbing*, xix. 86.

Party unloading goods from wagon standing in cut at railroad station was injured by moving car. The agent had instructed him to drive his wagon into the cut. *Held*, that the company was liable. *Foss et al. v. Chicago, M. & St. P. R. Co.*, xix. 112.

Teamster engaged in unloading cars at railroad station was injured by collision of other cars with those on which he was at work. *Held*, that in the absence of contributory negligence the company was liable. *Watson v. Wabash, St. L. & P. R. Co.*, xix. 114.

When door of freight-car falls upon person passing by, mere occurrence of accident affords no presumption of negligence. *Case v. Chicago, R. I. & P. R. Co.*, xix. 142.

In action for negligence, where defendant pleads that injury was caused by negligence of the plaintiff, it is error to charge that burden of proof is on defendant to prove issue. *Hawes v. Burlington, C. R. & N. R. Co.*, xix. 220.

When undisputed evidence fails to disclose negligence on defendant's part, case should be withdrawn by court from jury. *Reading & Columbia R. Co. v. Ritchie et al.*, xix. 267.

When there is only a scintilla of evidence of negligence, the case should not be permitted to go to the jury. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

When company owns a road which bears its name and same was presumably constructed by it, presumption is that it operates road; and when injury is inflicted by train on road, burden of proof is on company to show that it does not operate same. *Ferguson v. Wisconsin Central R. Co.*, xix. 285.

In action for injury caused by negligence, it is not essential that plaintiff should prove every material allegation in declaration. It is sufficient if he proves enough of such material allegations to make a cause of action. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

Instructions with regard to negligence should be given in connection with questions submitted on that point and not as general instructions in case. *Roma*

**NEGLECT (Contributory)—Continued.**

sence of evidence to contrary, or rational doubt as to acts and conduct of parties. *Phila. W. & B. R. Co. v. Stebbing*, xix 86.

In Georgia, where a person walking on a railroad-track is run over by a train through the negligence of the servants of the company, the party's contributory negligence may go in abatement or mitigation of damages. *Central R. R. of Ga. v. Brinson*, xix. 42.

Company is liable even to trespassers on track for injuries which could have been avoided by exercise of ordinary care; but contributory negligence goes in mitigation of damages. *East Tenn., Va. & Ga. R. R. Co. v. Fain*, xix. 102.

Freedom from contributory negligence need not be averred in declaration, unless other averments suggest such inference. *Street R. R. Co. v. Nolthenius*, xix. 191.

When there is testimony tending strongly to prove contributory negligence, it is error to charge that jury may infer absence of fault on plaintiff's part from known disposition of persons to avoid injury to themselves. *Maryland Central R. Co. v. Newbern*, xix. 261.

When there is affirmative and uncontradicted evidence of contributory negligence, the court should give binding instruction to jury to find for defendant. *Reading & Columbia R. Co. v. Ritchie et al.*, xix. 267.

Burden is upon plaintiff to prove freedom on his part from contributory negligence. *Pzolla v. Michigan Central R. Co.*, xix. 384.

Instruction as to contributory negligence, if desired by defendant, must be specially requested. *East Tenn., Va. & Ga. R. Co. v. Clark*, xix. 345.

When person is killed at railway-crossing and there is no witness of accident, evidence of general character of deceased for carefulness is not admissible to negative contributory negligence. *Chase v. Maine Central R. Co.*, xix. 356.

In case of death at crossing when no one is a witness of accident, it is error to charge jury that they may take into consideration, upon the question of contributory negligence, their knowledge of habits of thought and mind and natural instincts of men to preserve themselves from injury. *Chase v. Maine Central R. Co.*, xix. 356.

Instructions with regard to negligence should be given in connection with questions submitted on that point and not as general instructions in case. *Burns v. North Chicago Rolling-mill Co.* xix. 412.

**NOISE.**

Action will lie to abate nuisance created by operation of steam-engine to work cable for propelling street-cars under license from municipality. Nuisance consisted of noise, soot, and jarring of adjacent buildings. *Tuebner v. California Street R. Co.*, xix. 147.

**NUISANCE.**

Action will lie to abate nuisance created by operation of steam-engine to work cable for propelling street-cars under a license from municipality. Nuisance consisted of noise, soot, and jarring of adjacent buildings. *Tuebner v. California Street R. Co.*, xix. 147.

In action to abate nuisance and to recover damages for injuries sustained, fact that nuisance has since been abated does not deprive plaintiff of right to recover damages for injuries already sustained. *Tuebner v. California St. R. Co.*, xix. 147.

In action to recover damages for nuisance, plaintiff need not prove value of injury. Measure of damages is for jury. *Tuebner v. California St. R. Co.*, xix. 147.

**OBSTRUCTING HIGHWAYS.**

Party detained at crossing by cars standing a longer time than statute allows





**PARENT AND CHILD—Continued.**

railroad-track, where it was killed. *Held*, that parents were not as matter of law guilty of contributory negligence but that question was for jury. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

Whether or not parents are guilty of contributory negligence in allowing child to stray on track is generally for jury. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

Whether or not mother of young child was guilty of contributory negligence in leaving it in charge of brother of 13 years from whose custody it escaped and was killed by a street-car was for jury. *Dahl v. Milwaukee City R. Co.*, xix. 121.

When child escaped into street and was run over and killed by street-car at crossing, *held*, that whether or not its parents took proper precautions for its safety was for jury. *Roller v. Sutter Street R. R. Co.*, xix. 333.

**PENALTY.**

In proceeding against railroad company by indictment to recover penalty for killing person at crossing, amount of forfeiture between maximum and minimum fixed by statute is for jury. *State of Maine v. Maine Central R. Co.*, xix. 312.

**PHYSICIANS.**

In action for personal injuries, expert evidence of physician is admissible as to such future consequences as are reasonably certain to follow the injury, but not as to such as are contingent or merely possible. *New York, L. E. & W. R. Co. v. Strohm*, xix. 167.

Evidence of physician held admissible to prove from his examinations and from statements made on trial that plaintiff's arm was broken and that it would not be prudent for him to do hard work. *Johnson v. Central Vt. R. Co.*, xix. 169.

In action for personal injury, extract from paper signed by plaintiff's attending physician tending to contradict his subsequent testimony may be read to jury, the paper being excluded. Fact that paper is also signed by physician in employ of defendant is immaterial. *Smith v. Metropolitan R. Co.*, xix. 171.

When physician has known person for years but never treated or examined him until occurrence of accident, he may be permitted to testify whether in his opinion certain illness was result of accident or not. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

Physician cannot be asked his opinion as expert upon facts partly testified to upon trial and partly previously communicated to him. Proper practice in such case is to put hypothetical question to witness. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

**PLATFORMS.**

See **STATIONS.**

Person walking along platform was injured by fall of overloaded truck. *Held*, that as no wilful negligence was charged, the party was bound to show that there was no contributory negligence on her part. *Louisville, N. A. & C. R. Co. v. Shanks*, xix. 28.

**PLEADING.**

Misjoinder of counts in declaration will support demurrer to whole, but will not support demurrer to individual count. *Topf et al. v. West Shore & Ontario T. Co.*, xix. 7.

When allegations of petition are vague and indefinite, proper course is to move to make them definite and certain. *Rathburn v. Burlington & Mo. R. Co.*, xix. 137.

When allegations of petition are indefinite but language taken in ordinary



**PRACTICE—Continued.**

It is error to submit to a jury as possible element in a cause supposition of which there is no evidence. *Reading & Columbia R. Co. v. Ritchie*, xix. 267.

Instruction as to contributory negligence, if desired by defendant, specially requested. *East Tenn., Va. & Ga. R. Co. v. Clark*, xix. 34.

Court may properly refuse to give instructions upon question as there is no issue. *Louisville, etc., R. Co. v. Shires, Adm'r*, xix. 387.

Charge directing attention of jury to element of liability not in error. *Chicago & Alton R. Co. v. Robinson*, xix. 396.

Instruction assuming existence of material facts which are matter in question is error. *Chicago & Alton R. Co. v. Robinson*, xix. 396.

Instructions with regard to negligence and contributory negligence given in connection with questions submitted on these points and not in instructions in the case. *Burns v. North Chicago Rolling mill Co.*, xix. 412.

Court may refuse instruction which amounts to general proposition when same, so far as applicable, has been already given. *Simkins & G. R. Co.*, xix. 467.

Instructions announcing abstract propositions of law or singling out particular facts, are properly refused. *Chicago, R. Co. v. Kendig*, xix. 498.

Court cannot be asked to cover whole case in single instruction. *N. A. & C. R. Co. v. Shanklin*, xix. 555.

Instructions should be considered as a whole. *Louisville, N. A. & C. R. Co. v. Shanklin*, xix. 555.

When evidence of plaintiff was not doubted and defendant of defendant was immaterial that court omitted to instruct jury that burden of proof was on plaintiff. *Schlenger v. Chicago, M. & St. P. R. Co.*, xix. 625.

Court may refuse specific instructions when in general charge correctly instructs jury on point. *Pound v. Port Huron & S. V. R. Co.*, xix. 625.

**BINDING INSTRUCTIONS.**

In Arkansas, Circuit Court cannot determine sufficiency of evidence to return verdict when there is any evidence tending to sustain defendant. *Rock & Ft. Smith R. Co. v. Barker et ux.*, xix. 195.

Where there is evidence tending to show right of recovery in favor of plaintiff, court cannot take question from jury and direct verdict for defendant of evidence is that way. Every question of disputed fact is for jury. *R. I. & P. R. Co. v. Lewis*, xix. 224.

Court cannot determine facts and direct a verdict for one party if returned for other party it would set verdict aside. *Little R. Co. v. Henson*, xix. 440.

When the evidence is contradictory the court cannot direct a verdict. *Kins v. Columbia & G. R. Co.*, xix. 467.

**SPECIAL VERDICT.**

When questions submitted for special verdict substantially cover all issues and are reasonably specific, court will not interfere. *Chicago, M. & St. P. R. Co.*, xix. 74.

Court may properly admonish jury to make their answers consistent. *Hoppe Adm'r v. Chicago, M. & St. P. R. Co.*, xix. 74.

When special verdict is found, general verdict is unnecessary. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

When the special findings of a jury are so inconsistent as to distort evidence in favor of plaintiff, new trial should be granted. *North Chicago Rolling mill Co.*, xix. 412.

Special findings of jury will not control general verdict inconsistent with it. Judgment will not in such case be entered.



**PUSHING CARS.**See **BACKING CARS.****RELEASE.**

When release pleaded as affirmative defence is admitted by plaintiff but he pleads matter in avoidance, it is error to instruct jury that burden of proof is on defendant. *Hawes v. Burlington, C. R. & N. R. Co.*, xix. 220.

When party who was a minor released his claim for damages in consideration of sum paid him by defendant, which sum he did not have in his possession or under his control, an instruction to jury that plaintiff could not recover if he had it under his control does not require plaintiff to make tender unless he has in his control actual money received, and is not erroneous. *Hawes v. Burlington C. R. & N. R. Co.*, xix. 220.

Release of all claim for damages for personal injuries if fairly obtained and understandingly executed is bar to right of action. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

Release of claim for damages procured by agents of railroad company from passenger injured in railroad accident held to be void, because obtained through fraud and misrepresentation, and when the releasor was in great pain and under the influence of opiates. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

When release is procured by fraud from person in unfit condition to give it and money is paid on its execution, releasor may bring action without tendering back money paid or expressly rescinding release. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

**REMOVAL OF CAUSE.**See **UNITED STATES COURTS.**

When in action against railroad company same is liable, fact that assignees of road who are citizens of different State from plaintiff voluntarily become parties defendant does not entitle them to remove cause to United States courts. *Gudger v. Western N. C. R. Co.*, xix. 144.

When assignment of claim is legal and valid, fact that intent is to take from other party right to remove cause to U. S. courts does not give such party right to remove. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

**RESCISSION.**

When release is procured by fraud from person in unfit condition to give it and money is paid on its execution, releasor may bring action without tendering back money paid or expressly rescinding release. *Chicago, R. I. & P. R. Co. v. Lewis*, xix. 224.

**ROADS.**See **CROSSINGS; STREETS AND HIGHWAYS.****RUNNING SWITCH.**See **FLYING SWITCH.****SERVANTS.**

Servant of railroad company cannot sit as juror in case to which company is party. *Burnett v. Burlington & M. R. Co.*, xix. 25.

When duty of engineer is to inform switchman of obstruction on track, declarations made by him to switchman to the effect that he had killed a man, thus accounting for an obstruction, are admissible; but declarations made as to the circumstances of the killing are not admissible, because not made within the line of his duty. *Baltimore & Ohio R. Co. v. State to use*, xix. 83.

When driver of street-car ran into vehicle with an oath, exclaiming that he could "smash it anyhow," held, that there was evidence for the jury that the act was wilful, in which case the street-car company would not be liable. *Wood v. Detroit City St. R. Co.*, xix. 129.

**SERVANTS—Continued.**

It is not sufficient for master to give proper instructions to his servants to avoid liability; he must also see that they are obeyed. *Johnson v. Central Vt. R. R. Co.*, xix. 169.

In action by servant for injury received while coupling cars, when defendant pleads that injury was caused by negligence of plaintiff, it is error to charge that burden of proof is on defendant to prove issue. *Hawes v. Burlington, C. R. & N. R. Co.*, xix. 220.

Company liable for injury at crossing of main track occasioned by negligence of flagman who undertakes to watch main track, though not employed by company for that purpose. *Peck v. Michigan Central R. Co.*, xix. 257.

Servants of company called to rebut statutory presumption of negligence held under circumstances presumed to know facts. *Louisville & N. R. Co. v. Marriott*, xix. 509.

**SERVICE OF PROCESS.**

In action for killing animal, summons and complaint may be served on "depot-agent" without affidavit required in other actions against corporations when service is upon persons other than officers. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

Setting aside service of process on ground of irregularity does not abate or discontinue suit. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

Circuit Court on appeal from justice may permit constable to amend his return to summons so as to show proper service. *Kansas City, St. J. & C. R. Co. v. Turner*, xix. 506.

**SET-OFF.**

When engine is injured by running over horse on track, company cannot set off amount of injury in action brought against it by owner of horse. *Simkins v. Columbia & G. R. Co.*, xix. 467.

When complaint in action for killing cattle sets up failure to fence and negligent killing, company cannot set off injury done to train by throwing it off track. *Terre Haute & I. R. Co. v. Pierce*, xix. 581.

**SIGNALS.**

When party is driving along road towards railway and engineer on train fails to give statutory signals on approaching crossing, in consequence of which horses are frightened by train and injury ensues, the railroad company is liable. *Grand Trunk R. Co. v. Rosenberger*, xix. 8.

When train fails to give statutory signal on approaching crossing, and in consequence horses driven along highway parallel with railroad are frightened and injury ensues, the railroad company is liable. *Ransom v. Chicago, St. P., M. & O. R. Co.*, xix. 16.

Provisions of ordinance regulating speed of train, requiring bell to be rung at crossings and man to be posted in front of engine when running within municipal limits, held not to apply in case of injury to trespasser on track in swampy and uninhabited part of city. *Baltimore & Ohio R. Co. v. State to use*, xix. 88.

Person walking on railroad-track was run over and killed at sharp curve by train which failed to whistle at said point as required by rules of company. Held, that said rules were not intended to protect trespasser, and could not be invoked by his representatives in suit against company. *Louisville & N. R. Co. v. Howard's Adm'r*, xix. 98.

Railroad company held liable for injury at crossing caused by failure to continue signals as required by law. *Peart v. Grand Trunk R. Co.*, xix. 239.

Railroad company giving proper signal on backing cars and observing other precautions held not to have been guilty of negligence. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

When engine gives statutory signal on approaching railroad-crossing and keeps up same until crossing is passed, railroad company has discharged its full duty.



**SIGNALS—Continued.**

Engineer is not bound to give such signal as will enable parties using crossing to ascertain approach of train and avoid injury. *Chicago, B. & Q. R. Co. v. Dougherty*, xix. 292.

Question being whether certain signals were given on approaching railroad-crossing, evidence that signals were not given at similar crossing three miles distant was admissible. *Bower v. Chicago, M. & St. P. R. Co.*, xix. 301.

To run train across street in village where view of track is obstructed at high speed and without giving signals, is negligence, although signals are not required by statute. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Person approaching railroad-crossing with view obstructed has right to presume that engineer of train approaching at high rate of speed will give signals, and may regulate his conduct accordingly. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Fact that train approaching crossing does not give proper signals does not relieve traveller on highway from obligation to exercise proper care. *Schofield v. Chicago, M. & St. P. R. Co.*, xix. 353.

When crossing is peculiarly dangerous, servants of railroad company must give signals to full extent of statutory requirement; but failure on their part to do so will not exempt travellers on highway from obligation to exercise due care such as prudent men would exercise under circumstances. *Wabash, St. L. & P. R. Co. v. Wallace*, xix. 359.

It is error for court to charge that jury should give greater weight to affirmative evidence that signals were given than to negative evidence to effect that they were not or that parties did not hear them. *Louisville, etc., R. Co. v. Shires, Adm'r*, xix. 387.

Instruction that engineer of train approaching grade crossing is bound to give "due warning," so that persons travelling on highway may stop and allow train to pass, is error, as it may have led jury to assume that he was bound to do more than give the statutory signals. *Chicago & Alton R. Co. v. Robinson*, xix. 396.

It is error to instruct jury that greater weight should be given to testimony of witnesses stating that signals were not given than to that of witnesses stating that they were. The rule would seem to be the other way. *Chicago & Alton R. Co. v. Robinson*, xix. 397.

When engineer sees cattle ahead near track under circumstances indicating danger of their getting on the track, he is bound to use all means to frighten them off. *Alabama Great S. R. Co. v. Powers*, xix. 502.

Engineer perceiving cattle ahead on track is bound to sound alarm-whistle. *Alabama Gr. S. R. Co. v. Powers*, xix. 502.

In Missouri, engineer approaching crossing is not bound both to ring bell and sound whistle; either is sufficient. *Kansas City, St. J. & C. B. R. Co. v. Turner*, xix. 506.

When animal is killed at crossing in consequence of failure of engineer to give statutory signal, company is liable. *Kansas City, St. J. & C. B. R. Co. v. Turner*, xix. 506.

**SMOKE.**

Action will lie to abate smoke and soot nuisance created by operation of steam-engine to work cable for propelling street-cars under license from municipality. *Tuebner v. California St. R. Co.*, xix. 147.

**SNOW.**

See ICE AND SNOW.

**SPEED.**

Street-car company held liable in punitive damages for injury to horse and buggy caused by driver of street car continuing to drive at high speed after becoming aware of dangerous position of buggy on track ahead, owing to existence of obstruction in street, so that car ran into said buggy; and this though driver of the buggy may have been guilty of contributory negligence. *Citizens' Street R. v. Steen*, xix. 30.

**SPEED—Continued.**

Fact that train is run at higher rate of speed than allowed by law does not of itself constitute any proof of negligence, unless accident is shown to have occurred in consequence of such violation. *Phila., W. & B. R. Co. v. Stebbing*, xix. 36.

Fact that train is run at speed prohibited by ordinance does not relieve party on or near track from consequences of his contributory negligence. *Phila., W. & B. R. Co. v. Stebbing*, xix. 36.

Non-expert witness may testify as to his estimate of rate of speed of train, but the evidence is of an unsatisfactory nature. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

Question whether killing of child on track was occasioned by unlawful rate of speed within city limits was in this case properly submitted to the jury. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

Provisions of ordinance regulating speed of train, requiring bell to be rung at crossings and man to be posted in front of engine when running within municipal limits, *held* not to apply in case of injury to trespasser on track in swampy and uninhabited part of city. *Baltimore & Ohio R. R. Co. v. State to use*, xix. 83.

As to trespassers on track, driving of train outside of towns and cities at very high rate of speed cannot be deemed wilful negligence. *Louisville & N. R. Co. v. Howard's Adm'r*, xix. 98.

Railroad company held liable for injury at crossing caused by excessive speed of train. *Peart v. Grand Trunk R. Co.*, xix. 239.

It is error to charge jury that if law provides that train shall run at certain rate of speed and it runs at higher rate, this is negligence. Question of negligence is for jury only. *Western & Atlantic R. R. Co. v. King*, xix. 255.

It is not negligence for railroad company in open country to run its trains over public crossing at rate of thirty miles an hour. *Reading & Columbia R. Co. v. Ritchie et al.*, xix. 267.

Railroad company backing cars with reasonable speed and taking other proper precautions *held* not to have been guilty of negligence. *Bohan v. Milwaukee, L. S. & W. R. Co.*, xix. 276.

Whether rate of speed at which train is run across street is reasonable or not is for jury. *Howard v. St. Paul, M. & M. R. Co.*, xix. 283.

To run train across street in village where view of track is obstructed at high speed and without giving signals, is negligence, although signals are not required by statute. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Person approaching railroad-crossing with view obstructed has right to presume that engineer of train approaching at high rate of speed will give signals, and may regulate his conduct accordingly. *Loucks v. Chicago, M. & St. P. R. Co.*, xix. 305.

Fact that train approaches crossing at improper rate of speed does not relieve traveller on highway from obligation to exercise proper care. *Schofield v. Chicago, M. & St. P. R. Co.*, xix. 353.

Witness who has been brakeman, on train for many years may be asked to state his opinion as to rate of speed at which train was going at certain time. *Louisville, N. A. & C. R. Co. v. Shires, Adm'r*, xix. 387.

In action for killing cattle, question whether engineer is negligent in running train at speed of 35 or 40 miles an hour is for jury. *East Tenn., Va. & Ga. R. Co. v. Bayliss*, xix. 480.

Jury had no right to find that train could have been stopped within shorter space, considering its rate of speed, when evidence was all the other way. *Union Pacific R. Co. v. Shannon*, xix. 500.

In action for killing cattle, fact that speed of train was greater than customary, though not in excess of rate allowed by statute and rules of company, is no evidence of negligence. *Louisville & N. R. Co. v. Marriott*, xix. 509.

Witness is incompetent to testify as to space within which he has observed train to be stopped, when he is unable to state speed of trains at the time. *Louisville & N. R. Co. v. Marriott*, xix. 509.

In action for killing animal by train, no rate of speed is negligence *per se*. *Hannibal & St. Jo R. Co. v. Young*, xix. 512.



### **STREET CARS.**

Street-car company held liable in punitive damages for injury to horse and buggy caused by driver of street car continuing to drive at high speed after becoming aware of dangerous position of buggy on track ahead owing to existence of obstruction on street, so that car ran into said buggy; and this, though driver of the buggy may have been guilty of contributory negligence. *Citizens' Street R. v. Steen*, xix. 30.

Whether or not under facts of this case driver of street-car was negligent in running over child in street was for jury. *Dahl, Adm'r, v. Milwaukee City R. Co.*, xix. 121.

Whether or not mother of young child was guilty of contributory negligence in leaving it in charge of brother of 18 years from whose custody it escaped and was killed by a street-car, was for jury. *Dahl, Adm'r, v. Milwaukee City R. Co.*, xix. 121.

A person was standing by his horse's head in city street. Seeing steam-dummy approaching he leaped on cart and attempted to whip up the horse. The dummy, however, struck the cart and killed him. *Held*, that the questions

**TELEGRAPHS—Continued.**

United States Rev. Sts. § 5263 does not deprive States of power to regulate erection of telegraph-wires. *Banks v. Highland St. R. Co.*, xix. 139.

When telegram was not delivered at home of party on Sunday, though three attempts were made to deliver it at his store, *held*; there was no evidence of gross negligence so as to render the telegraph company liable in damages for injury to feelings of sender. *Gulf, C. & S. F. R. Co. v. Levy*, xix. 151.

Institution of suit is full compliance with stipulation on a telegraph-blank that claim for damages shall be presented within sixty days. *Gulf, C. & S. F. R. Co. v. Levy*, xix. 151.

**TORTS.**

Allegation that railroad company knowingly permitted third person to use property of defendant in such manner as was *per se* injurious to adjacent land of plaintiff imputes to company actionable wrong. *Topf et al. v. West Shore & Ont. T. Co.*, xix. 7.

**TRESPASSERS.**

Engineer seeing party ahead on track may ordinarily presume that he will step off in time to avoid injury; but if he knows the party to be deaf he must use proper precautions to prevent injury to him. *International & Gt. N. R. Co. v. Smith*, xix. 21.

Boy walking on track caught his foot in switch and was run over. *Held*, that if servants of company after becoming aware of boy's danger could by exercise of reasonable care have prevented the injury, the company was liable. *Burnett v. Burlington & M. R. Co.*, xix. 25.

In an action to recover damages to a person on or near a railroad-track for injuries caused by a passing train, no presumption of negligence arises from occurrence of accident. The negligence must be proved. *Phila., W. & B. R. Co. v. Stebbing*, xix. 86.

Fact that train is run at speed prohibited by ordinance does not relieve party on or near track from consequences of his contributory negligence. *Phila., W. & B. R. Co. v. Stebbing*, xix. 86.

Boy walking upon railroad-track saw train approaching, but stepped off of track three feet only. He was struck and injured by a piece of timber projecting from the train. *Held*, that his contributory negligence precluded recovery. *Central R. R. of Ga. v. Brinson*, xix. 42.

Railroad company is only liable for injuries to trespassers on a railroad-track when the same has been caused by gross recklessness of servants or by reason of their failure to attempt to avoid injury after becoming aware of party's dangerous position. *Central R. R. of Ga. v. Brinson*, xix. 42.

Mere fact that persons have trespassed on track frequently and that company had taken no steps to stop them, does not amount to an implied consent to such use of the tracks, and does not vary the company's duty as to trespassers. *Central R. R. of Ga. v. Brinson*, xix. 42.

In Georgia, where a person walking on a railroad-track is run over by a train through the negligence of the servants of the company, the party's contributory negligence may go in abatement or mitigation of damages. *Central R. R. of Ga. v. Brinson*, xix. 42.

Question whether killing of child on track was occasioned by unlawful rate of speed within city limits was in this case properly submitted to the jury. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

Where child is killed on railroad-track, evidence that same is considerably used as footpath is admissible upon the question of negligence. *Hoppe, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 74.

Person walking on railroad-track is a trespasser, and mere acquiescence of railroad company in such use by public does not impose upon it any duty of protection as to such trespasser. *Baltimore & Ohio R. R. Co. v. State to use*, xix. 88.

**TRESPASSERS—Continued.**

Provisions of ordinance regulating speed of train, requiring bell to be rung at crossings and man to be posted in front of engine when running within municipal limits, *held*, not to apply in case of injury to trespasser on track in swampy and uninhabited part of city. *Baltimore & Ohio R. R. Co. v. State to use*, xix. 88.

Company held liable for failure of engineer to slacken speed upon perceiving a child ahead on the track which he mistook for log of wood, in consequence of which child was run over and killed. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

In action for negligently running over child on track it may be shown that company failed to fence its road as required by statute. *Keyser v. Chicago & G. T. R. Co.*, xix. 91.

When boy was run over while lying upon track *held*, that company was not liable unless servants could by exercise of reasonable care have avoided injury to him after discovering his perilous condition. There was at any rate no such evidence of wilful negligence as would warrant punitive damages. *Louisville & N. R. R. Co. v. Green's Adm'r*, xix. 95.

Person walking on railroad-track was run over and killed at sharp curve by train which failed to whistle at said point as required by rules of company. *Held*, that said rules were not intended to protect trespasser and could not be invoked by his representatives in suit against company. *Louisville & N. R. Co. v. Howard's Adm'r*, xix. 98.

As to trespassers on track, driving of train outside of towns and cities at very high rate of speed cannot be deemed wilful negligence. *Louisville & N. R. Co. v. Howard's Adm'r*, xix. 98.

Company is liable even to trespassers on track for injuries which could have been avoided by exercise of ordinary care, but contributory negligence goes in mitigation of damages. *East Tenn., Va. & Ga. R. R. Co. v. Fain*, xix. 102.

It is error to charge the jury that company is not liable for injuries to trespassers on its track, where no evil intent or wanton conduct appears. *East Tenn., Va. & Ga. R. R. Co. v. Fain*, xix. 102.

Company is not liable for running over trespasser walking on its tracks who was not seen by the engineer. The latter was not bound to keep a lookout for such trespasser. *McAllister v. Burlington & N. W. R. Co.*, xix. 108.

Company not held liable for killing of farmer who got upon track to drive off his stock and failed to get out of the way of an approaching train in time. *Schittenhelm's Adm'r v. Louisville & N. R. Co.*, xix. 111.

Engineer is not bound to keep lookout for mere trespasser on track; but if after seeing him the engineer fails to use proper care to avoid injuring or killing him, the company is liable. *Scheffler v. Minneapolis & St. L. R. Co.*, xix. 178.

Woman and child walking on railroad-track commonly used by public as foot-path without objection on part of company, were struck and killed by train making flying switch at point where highway crossed track. *Held*, that the company owed no such duty to them as to travellers on said highway, and that they had been guilty of such contributory negligence as precluded recovery. *Grethen, Adm'r, v. Chicago, M. & St. P. R. Co.*, xix. 342.

**TRUSTEES.**

Railroad company is liable for injury caused by them in surveying road, though legal title to their property is in State and equitable title is in third parties. *Gudger v. Western N. C. R. Co.*, xix. 144.

**TURN-TABLES**

In action for injury to child by railroad turn-table, where issue is lack of care in guarding it, company may prove that fastenings used were similar to those employed generally in such turn-tables, and may also prove by expert that it would not be practicable to lock or fence turn-tables. *Kolsti v. Minneapolis & St. L. R. Co.*, xix. 140.



**UNITED STATES.**

State may in ceding territory to United States reserve certain rights and jurisdiction therein. *Chicago, R. I. & P. R. Co. v. McGlinn*, xix. 532.

**UNITED STATES COURTS.**

See **REMOVAL OF CAUSES.**

When in action against railroad company same is liable, fact that assignees : road who are citizens of different State from plaintiff voluntarily become part : defendant does not entitle them to remove cause to United States courts. *Ginger v. Western N. C. R. Co.*, xix. 144.

When assignment of claim is legal and valid, fact that intent is to take fr : opposite party right to remove cause to U. S. courts does not give such pa : right to remove. *Vimont v. Chicago & N. W. R. Co.*, xix. 215.

**WHISTLES.**

See **SIGNALS.**

















